MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 27, 2022 through December 31, 2022

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
BRIDGET M. McCORMACK	2029[1]
ELIZABETH T. CLEMENT	2027[2]
Justices	
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2029[3]
DAVID F. VIVIANO	2025
RICHARD H. BERNSTEIN	2023
ELIZABETH T. CLEMENT	2027[4]
MEGAN K. CAVANAGH	2027
ELIZABETH M. WELCH	2029

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

TIMOTHY J. RAUBINGER	REGINA T. DELMASTRO
SHARI M. OBERG	CHRISTOPHER M. THOMPSON
DEBRA A. GUTIERREZ-McGUIRE	CHRISTOPHER M. SMITH
MICHAEL S. WELLMAN	JONATHAN S. LUDWIG
GARY L. ROGERS	LIZA C. MOORE
STACI STODDARD	KAREN A. KOSTBADE
MARK E. PLAZA	CHERYL L. NOWAK

State Court Administrator
THOMAS P. BOYD

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS
Crier: JEFFREY A. MILLS

[1] To November 18, 2022.

[2] From November 18, 2022.

[3] From November 18, 2022.

[4] To November 18, 2022.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
ELIZABETH L. GLEICHER	2025
Chief Judge Pro Tem	
MICHAEL F. GADOLA	2023
Judges	
DAVID SAWYER	2023
MARK J. CAVANAGH	2027
KATHLEEN JANSEN	2025
JANE E. MARKEY	2027
KIRSTEN FRANK KELLY	2025
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
MICHAEL J. KELLY	2027
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2027[1]
MARK T. BOONSTRA	2027
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
ANICA LETICA	2027
JAMES R. REDFORD	2023
MICHELLE M. RICK	2027
SIMA G. PATEL	2027
NOAH P. HOOD	2027
KRISTINA ROBINSON GARRETT	2029
CHRISTOPHER P. YATES	2025

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] To December 13, 2022.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	SARA S. LISZNYAI	2027
2.	DONNA B. HOWARD	2023
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2025
	JENNIFER L. SMITH	2027
3.	YVONNA C. ABRAHAM	2023
	DAVID J. ALLEN	2027
	CHANDRA W. BAKER-ROBINSON	2027
	MARIAM BAZZI	2027
	ANNETTE J. BERRY	2025
	GREGORY D. BILL	2025
	CHRISTOPHER MICHAEL BLOUNT	2023
	KAREN Y. BRAXTON	2025
	JEROME C. CAVANAGH	2025
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	BRADLEY L. COBB	2027[1]
	KEVIN J. COX	2025
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2025
	SUSAN A. DABAJA	2023
	CHRISTOPHER D. DINGELL	2027
	PRENTIS EDWARDS, Jr.	2025
	CHARLENE M. ELDER	2027
	WANDA EVANS	2023
	EDWARD EWELL, Jr.	2025
	HELAL A. FARHAT	2027
	PATRICIA SUSAN FRESARD	2023
	SHEILA ANN GIBSON	2023
	JOHN H. GILLIS, Jr.	2027
	ALEXIS GLENDENING	2023
	NICOLE NEAL GOODSON	2025[2]
	TRACY E. GREEN	2025
	DAVID ALAN GRONER	2023
	ADEL A. HARB	2025
	BRIDGET MARY HATHAWAY	2025
	DANA MARGARET HATHAWAY	2025

[1] From October 10, 2022.

[2] From November 7, 2022.

		Term Expires January 1 of
	THOMAS M.J. HATHAWAY	2023
	CHARLES S. HEGARTY	2025
	CATHERINE HEISE	2025
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023
	EDWARD JOSEPH	2027
	MARY BETH KELLY	2027
	TIMOTHY M. KENNY	2023
	DONALD KNAPP	2027
	QIANA D. LILLARD	2025
	KATHLEEN M. McCARTHY	2025
	CYLENTHIA LaTOYE MILLER	2027
	JOHN A. MURPHY	2023
	LYNNE A. PIERCE	2027[3]
	KELLY RAMSEY	2023
	MARK T. SLAVENS	2023
	LESLIE KIM SMITH	2025
	MARTHA M. SNOW	2023
	BRIAN R. SULLIVAN	2023
	CARLA TESTANI	2027
	DEBORAH A. THOMAS	2025
	REGINA DANIELS THOMAS	2025
	MARGARET M. Van HOUTEN	2027
	SHANNON N. WALKER	2027
	DARNELLA DENISE WILLIAMS-CLAYBOURN	2023
4.	SUSAN BEEBE JORDAN	2023
	RICHARD N. LaFLAMME	2023
	JOHN G. McBAIN, Jr.	2027
	THOMAS D. WILSON	2025
5.	VICKY ALSPAUGH	2027
6.	MARTHA ANDERSON	2027
	MARY ELLEN BRENNAN	2027
	RAE LEE CHABOT	2023
	DAVID M. COHEN	2023
	JACOB JAMES CUNNINGHAM	2025
	KAMESHIA D. GANT	2025
	LISA ORTLIEB GORCYCA	2027
	NANCI J. GRANT	2027

[3] To August 31, 2022.

		Term Expires January 1 of
	MAUREEN H. KINSELLA	2025
	LISA LANGTON	2023
	JEFFREY S. MATIS	2027
	CHERYL A. MATTHEWS	2023
	JULIE A. McDONALD	2025
	PHYLLIS C. McMILLEN	2025
	DANIEL PATRICK O'BRIEN	2023
	YASMINE ISSHAK POLES	2023
	KWAME' LeROY ROWE	2025
	LORIE N. SAVIN	2027
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2025
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2025
	B. CHRIS CHRISTENSON	2027
	JOSEPH J. FARAH	2023[4]
	JOHN A. GADOLA	2027
	KHARY L. HANIBLE	2023[5]
	ELIZABETH ANNE KELLY	2025
	MARK W. LATCHANA	2027
	DAVID J. NEWBLATT	2023
	BRIAN S. PICKELL	2025
8.	SUZANNE KREEGER	2027
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2025
	GARY C. GIGUERE, Jr.	2027
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2025
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2025
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023
	DARNELL JACKSON	2025
	MANVEL TRICE, III	2027
11.	BRIAN DANIEL RAHILLY	2027
12.	CHARLES R. GOODMAN	2027
13.	KEVIN A. ELSENHEIMER	2027
	THOMAS G. POWER	2023
14.	KATHY L. HOOGSTRA	2027

[4] To November 9, 2022.

[5] From December 7, 2022.

		Term Expires January 1 of
	KENNETH S. HOOPES	2023
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2025
15.	P. WILLIAM O'GRADY	2027
16.	JAMES M. BIERNAT, Jr.	2025
	RICHARD L. CARETTI	2023
	TERI L. DENNINGS	2025
	DIANE M. DRUZINSKI	2027
	JENNIFER FAUNCE	2025
	JULIE GATTI	2027
	JAMES M. MACERONI	2027
	RACHEL RANCILIO	2023
	MATTHEW P. SABAUGH.	2023
	EDWARD A. SERVITTO, Jr.	2025
	MICHAEL E. SERVITTO	2023
	MATTHEW S. SWITALSKI	2027
	JOSEPH TOIA	2027
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2025
17.	CURT A. BENSON	2025
	ALIDA J. BRYANT	2025[6]
	PAUL J. DENENFELD	2023
	CHRISTINA ELMORE	2025
	KATHLEEN A. FEENEY	2027
	MAUREEN GOTTLIEB	2027
	DEBORAH McNABB	2023
	SCOTT A. NOTO	2027
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	MARK A. TRUSOCK	2025
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2027
19.	DAVID A. THOMPSON	2027
20.	KENT D. ENGLE	2023
	JON H. HULSING	2027
	KAREN J. MIEDEMA	2023
	JON Van ALLSBURG	2025
21.	MARK H. DUTHIE	2025
	SARA SPENCER-NOGGLE	2023

[6] From August 15, 2022.

		Term Expires January 1 of
22.	ARCHIE CAMERON BROWN	2023[7]
	PATRICK J. CONLIN, Jr.	2027
	TIMOTHY P. CONNORS	2025
	CAROL A. KUHNKE	2025
	ARIANNE E. SLAY	2023[8]
	TRACY ELISABETH Van den BERGH	2027
23.	DAVID C. RIFFEL	2023
24.	TIMOTHY C. WRATHELL	2027
25.	JENNIFER A. MAZZUCHI	2027
26.	KEITH EDWARD BLACK	2027
27.	ROBERT D. SPRINGSTEAD	2025
28.	JASON J. ELMORE	2027
29.	CORI E. BARKMAN	2023
	SHANNON L.W. SCHLEGEL	2027
30.	ROSEMARIE E. AQUILINA	2027
	CLINTON CANADY, III	2023
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2025
	CAROLYN N. KOENIG	2027
	LISA K. McCORMICK	2025
	WANDA M. STOKES	2027
31.	DANIEL A. DAMMAN	2027
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2025
32.	MICHAEL K. POPE	2027
33.	ROY C. HAYES, III	2027
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2027
36.	KATHLEEN M. BRICKLEY	2025
	JEFFREY J. DUFON	2027
37.	JOHN A. HALLACY	2025
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2027
38.	MARK S. BRAUNLICH	2025
	WILLIAM PAUL NICHOLS	2023
	DANIEL S. WHITE	2027
39.	ANNA MARIE ANZALONE	2025
	MICHAEL R. OLSAVER	2027

[7] To July 31, 2022.

[8] From December 7, 2022.

		Term Expires January 1 of
40.	MICHAEL D. HODGES	2027
	NICK O. HOLOWKA	2023
41.	MARY BROUILLETTE BARGLIND	2023
	CHRISTOPHER S. NINOMIYA	2027
42.	MICHAEL J. BEALE	2027
	STEPHEN P. CARRAS	2025
43.	MARK A. HERMAN	2023
44.	L. SUZANNE GEDDIS	2027
	MICHAEL P. HATTY	2025
	MATTHEW J. McGIVNEY	2023
45.	PAUL E. STUTESMAN	2025
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2027
47.	JOHN B. ECONOMOPOULOS	2023
48.	MARGARET ZUZICH BAKKER	2023
	ROBERTS KENGIS	2027
49.	KIMBERLY L. BOOHER	2027
	AMY C. CLAPP	2025[9]
50.	JAMES P. LAMBROS	2025
51.	SUSAN K. SNIEGOWSKI	2027
52.	GERALD M. PRILL	2027
53.	AARON J. GAUTHIER	2023
54.	AMY G. GIERHART	2025
55.	TARA S. HOVEY	2025[10]
	ROY G. MIENK	2025
56.	JANICE K. CUNNINGHAM	2025
	JOHN DOUGLAS MAURER	2027
57.	JENNIFER E. DEEGAN	2025

[9] From August 22, 2022.

[10] From October 11, 2022.

DISTRICT JUDGES

		Term Expires January 1 of
1.	MICHAEL C. BROWN	2027
	AMANDA L. EICHER	2025[1]
	JACK VITALE	2023
2A.	TODD M. MORGAN	2023
	LAURA J. SCHAEDLER	2023
2B.	MEGAN STIVERSON	2027
3A.	BRENT R. WEIGLE	2027
3B.	JEFFREY C. MIDDLETON	2027
	ROBERT PATTISON	2025
4.	STACEY A. RENTFROW	2027
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2027
	GORDON GARY HOSBEIN	2027
	STERLING R. SCHROCK	2025
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2027
	MICHAEL T. McKAY	2023
8.	CHRISTOPHER T. HAENICKE	2025
	KATHLEEN P. HEMINGWAY	2027
	ALISA L. PARKER-LaGRONE	2025
	RICHARD A. SANTONI	2027
	NAMITA SHARMA	2027
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2027
	JASON C. BOMIA	2023
	MICHELLE L. RICHARDSON	2027
	TRACIE L. TOMAK	2025
12.	ALLISON BATES	2027
	ROBERT K. GAECKE, Jr	2023
	DANIEL GOOSTREY	2025
	MICHAEL J. KLAEREN	2027
14A.	ANNA M. FRUSHOUR	2027
	J. CEDRIC SIMPSON	2025
	KIRK W. TABBEY	2023
14B.	ERANE C. WASHINGTON	2027
15.	JOSEPH F. BURKE	2025
	MIRIAM A. PERRY	2023
	KAREN Q. VALVO	2027
16.	SEAN P. KAVANAGH	2027
	KATHLEEN J. McCANN	2025
17.	KRISTA LICATA HAROUTUNIAN	2027
	KAREN S. KHALIL	2023

[1] From September 6, 2022.

		Term Expires January 1 of
18.	SANDRA A. FERENCE CICIRELLI	2025
	MARK A. McCONNELL.	2027
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2025
	MARK W. SOMERS	2027
20.	MARK J. PLAWECKI	2027
	DAVID TURFE	2025
21.	RICHARD L. HAMMER, Jr.	2027
22.	SABRINA L. JOHNSON	2025
23.	VICTORIA IRENE SHACKELFORD	2023
	JOSEPH D. SLAVEN	2027
24.	JOHN T. COURTRIGHT	2027
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2027
	DAVID J. ZELENAK	2023
27.	ELIZABETH L. DiSANTO	2025
28.	ELISABETH MIMI MULLINS	2027
29.	BREEDA K. O'LEARY	2025
30.	BRIGETTE OFFICER HOLLEY	2023
31.	ALEXIS G. KROT	2027
32A.	REBEKAH RUTH COLEMAN	2027
33.	JENNIFER COLEMAN HESSON	2023
	MICHAEL K. McNALLY	2025
34.	TINA BROOKS GREEN	2025
	LISA MARIE ROBINSON MARTIN	2027
	BRIAN A. OAKLEY	2023
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2025
	JAMES A. PLAKAS	2027
36.	LYDIA NANCE ADAMS	2023[2]
	ROBERTA C. ARCHER	2025
	DEMETRIA BRUE	2027
	ESTHER LYNISE BRYANT	2027
	DONALD COLEMAN	2025
	KAHLILIA YVETTE DAVIS	2023
	RAEIGEN L. EVANS	2023
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2025
	AUSTIN WILLIAM GARRETT	2023
	RONALD GILES	2027
	ADRIENNE HINNANT-JOHNSON	2027
	SHANNON A. HOLMES	2027
	SHAWN K. JACQUE	2025[3]
	PATRICIA L. JEFFERSON	2027
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2025

[2] To October 14, 2022.

[3] From December 27, 2022.

		Term Expires January 1 of
	CHRISTINA VERNICE KENNEDY	2025[4]
	KENNETH J. KING	2027
	JACQUELYN A. McCLINTON	2023
	WILLIAM C. McCONICO	2025
	DONNA R. MILHOUSE	2025
	SEAN B. PERKINS	2023
	KEVIN F. ROBBINS	2025
	DAVID S. ROBINSON, Jr.	2025
	ALIYAH SABREE	2025
	MILLICENT D. SHERMAN	2027
	MARLENA E. TAYLOR	2025
	MICHAEL E. WAGNER	2027
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2025
	MICHAEL CHUPA	2027
	SUZANNE M. FAUNCE	2023
38.	KATHLEEN G. GALEN	2027
39.	JOSEPH F. BOEDEKER	2027
	ALYIA MARIE HAKIM	2023
	KATHLEEN E. TOCCO	2025
40.	MARK A. FRATARCANGELI	2025
	JOSEPH CRAIGEN OSTER	2027
41A.	ANNEMARIE M. LEPORE	2027
	DOUGLAS P. SHEPHERD	2025
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY A. WIEGAND	2025
41B.	JACOB M. FEMMININEO, Jr.	2027
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2025
42-1.	JENNIFER ANDARY	2027
42-2.	WILLIAM H. HACKEL, III	2025
43.	BRIAN C. HARTWELL	2027
	KEITH P. HUNT	2025
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2025
	JAMES L. WITTENBERG	2023[5]
45.	MICHELLE FRIEDMAN APPEL	2023
	JAIMIE POWELL HOROWITZ	2027
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2027
	DEBRA NANCE	2025
47.	JAMES B. BRADY	2027
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2025
	KIMBERLY F. SMALL	2027

[4] From October 17, 2022.

[5] To November 20, 2022.

		Term Expires January 1 of
50.	RONDA FOWLKES GROSS	2025
	MICHAEL C. MARTINEZ	2027
	CYNTHIA THOMAS WALKER	2027
51.	TODD A. FOX	2025
	RICHARD D. KUHN, Jr.	2027
52-1.	ROBERT BONDY	2025
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2027
52-2.	JOSEPH G. FABRIZIO	2027
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2025
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2027
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. McGINNIS	2027
53.	DANIEL B. BAIN	2027
	SHAUNA MURPHY	2023
54A.	STACIA J. BUCHANAN	2027
	MICHAEL ANTHONY FLORES	2023
	KRISTEN D. SIMMONS	2023
	CYNTHIA M. WARD	2025
54B.	RICHARD D. BALL	2023
	MOLLY HENNESSEY GREENWALT	2025
55.	DONALD L. ALLEN	2023
	RICHARD L. HILLMAN	2027
56A.	KELLY E. MORTON	2027
	JULIE O'NEILL	2023
56B.	MICHAEL LEE SCHIPPER	2025
57.	WILLIAM A. BAILLARGEON	2025
	JOSEPH S. SKOCELAS	2027
58.	JUANITA F. BOCANEGRA	2027
	CRAIG E. BUNCE	2025
	BRADLEY S. KNOLL	2027
	JUDITH K. MULDER	2023
59.	PETER P. VERSLUIS	2023
60.	MARIA LADAS HOOPES	2027
	RAYMOND J. KOSTRZEWA Jr.	2025
	PAULA BAKER MATHES	2027
	GEOFFREY THOMAS NOLAN	2023
61.	NICHOLAS S. AYOUB	2023
	MICHAEL J. DISTEL	2025
	JENNIFER FABER	2023
	JEANINE NEMESI LaVILLE	2025
	ANGELA T. ROSS	2023
	KIMBERLY A. SCHAEFER	2027
62A.	PABLO CORTES	2027
	STEVEN M. TIMMERS	2025
62B.	AMANDA J. STERKENBURG	2027
63.	JEFFREY J. O'HARA	2027
	SARA J. SMOLENSKI	2027

		Term Expires January 1 of
64A.	RAYMOND P. VOET	2027
64B.	ADAM EGGLESTON	2027
65A.	MICHAEL E. CLARIZIO	2027
65B.	STEWART D. McDONALD	2027
66.	WARD L. CLARKSON	2025
67-1.	DAVID J. GOGGINS	2027
67-2.	JESSICA J. HAMMON	2023
	JENNIFER J. MANLEY	2027
67-3.	VIKKI BAYEH HALEY	2027
67-4.	MARK C. McCABE	2027
	CHRISTOPHER R. ODETTE	2025
67-5.	WILLIAM H. CRAWFORD, II	2025
	G. DAVID GUINN	2027
	HERMAN MARABLE, Jr.	2025
	TABITHA M. MARSH	2027
70-1.	TERRY L. CLARK	2025
	M. RANDALL JURRENS	2023
70-2.	ELIAN FICHTNER	2027
	ALFRED T. FRANK	2027
	DAVID D. HOFFMAN	2025
71A.	LAURA CHEGER BARNARD	2027
71B.	JASON ERIC BITZER	2027
72.	MONA S. ARMSTRONG	2027
	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2025
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2025
	DAWN A. KLIDA	2027
75.	MICHAEL CARPENTER	2027
76.	ERIC R. JANES	2027
77.	PETER M. JAKLEVIC	2027
78.	H. KEVIN DRAKE	2027
79.	JOHN DAVID MIDDLEBROOK	2027
80.	JOSHUA M. FARRELL	2027
82.	TROY B. DANIEL	2023
84.	AUDREY D. Van ALST	2027
86.	ROBERT A. COONEY	2025
	MICHAEL S. STEPKA	2023
89.	MARIA I. BARTON	2027
90.	ANGELA LASHER	2027
92.	BETH A. GIBSON	2027
94.	STEVE PARKS	2027
95A.	ROBERT J. JAMO	2027
95B.	JULIE A. LaCOST	2027
96.	ROGER W. KANGAS	2027
	KARL WEBER	2023
97.	NICHOLAS J. DAAVETTILA	2027

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2020
CARL F. JARBOE	2018
THEODORE A. METRY	2020
MATTHEW R. RUMORA	2018

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2025
Alger/Schoolcraft	CHARLES C. NEBEL	2025
Allegan	MICHAEL L. BUCK	2025
Alpena	ALAN MICHAEL CURTIS	2023
Antrim	NORMAN R. HAYES	2025
Arenac	RICHARD E. VOLLBACH, Jr.	2025
Baraga	TIMOTHY S. BRENNAN	2025
Barry	WILLIAM M. DOHERTY	2025
Bay	JAN A. MINER	2025
Benzie	JOHN D. MEAD	2025
Berrien	BRIAN BERGER	2025
Berrien	MABEL JOHNSON MAYFIELD	2027
Branch	KIRK A. KASHIAN	2025
Calhoun	MICHAEL L. JACONETTE	2023
Cass	CAROL M. BEALOR	2025
Cheboygan	DARYL P. VIZINA	2025
Chippewa	ERIC BLUBAUGH	2027
Clare/Gladwin	MARCY A. KLAUS	2025
Clinton	LISA SULLIVAN	2025
Crawford	MONTE J. BURMEISTER	2025
Delta	PERRY R. LUND	2025
Dickinson	THOMAS D. SLAGLE	2025
Eaton	THOMAS K. BYERLEY	2025
Emmet/Charlevoix	VALERIE K. SNYDER	2025
Genesee	JENNIE E. BARKEY	2027
Genesee	F. KAY BEHM	2025[1]
Gogebic	ANNA ROSE TALASKA	2025
Grand Traverse	JENNIFER L. WHITTEN	2023
Gratiot	KRISTIN M. BAKKER	2025
Hillsdale	MICHELLE SNELL BIANCHI	2025
Houghton	FRASER T. STROME	2025
Huron	DAVID B. HERRINGTON	2027
Ingham	SHAUNA DUNNINGS	2025
Ingham	RICHARD J. GARCIA	2027
Ionia	ROBERT S. SYKES, Jr.	2025
Iosco	CHRISTOPHER P. MARTIN	2025
Iron	DONALD S. POWELL	2025

[1] To December 15, 2022.

County		Term Expires January 1 of
Isabella	STUART BLACK	2025
Jackson	DIANE M. RAPPLEYE	2025
Kalamazoo	TIFFANY ANKLEY	2027
Kalamazoo	CURTIS J. BELL	2025
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE M. BUDAY	2025
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2025
Kent	G. PATRICK HILLARY	2025
Kent	DAVID M. MURKOWSKI	2027
Keweenaw	KEITH WAREN DeFORGE	2025
Lake	MARK S. WICKENS	2025
Lapeer	JUSTUS C. SCOTT	2025
Leelanau	MARIAN F. KROMKOWSKI	2025
Lenawee	CATHERINE ANN SALA	2025
Livingston	MIRIAM A. CAVANAUGH	2025
Luce/Mackinac	W. CLAYTON GRAHAM	2025
Macomb	SANDRA A. HARRISON	2025
Macomb	SARA ANN SCHIMKE	2023
Manistee	THOMAS N. BRUNNER	2025
Marquette	CHERYL L. HILL	2025
Mason	JEFFREY C. NELLIS	2025
Mecosta/Osceola	TYLER O. THOMPSON	2025
Menominee	DANIEL E. HASS	2025
Midland	DORENE S. ALLEN	2025
Missaukee	MELISSA J. RANSOM	2025
Monroe	FRANK L. ARNOLD	2027
Monroe	CHERYL E. LOHMEYER	2025
Montcalm	CHARLES W. SIMON, III	2025
Montmorency	LORA E. GREENE	2025
Muskegon	GREGORY C. PITTMAN	2025
Muskegon	BRENDA E. SPRADER	2023
Newaygo	MELISSA K. DYKMAN	2025
Oakland	JENNIFER S. CALLAGHAN	2023
Oakland	LINDA S. HALLMARK	2025
Oakland	DANIEL A. O'BRIEN	2027
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2025
Ogemaw	SCOTT M. WILLIAMS	2023
Ontonagon	JANIS M. BURGESS	2025
Oscoda	CASSANDRA L. MORSE-BILLS	2025

County		Term Expires January 1 of
Otsego	MICHAEL K. COOPER	2025
Ottawa	MARK A. FEYEN	2025
Presque Isle	ERIK J. STONE	2025
Roscommon	MARK JERNIGAN	2025
Saginaw	PATRICK J. McGRAW	2025
Saginaw	BARBARA L. METER	2027
St. Clair	ELWOOD L. BROWN	2027
St. Clair	JOHN D. TOMLINSON	2025
St. Joseph	DAVID C. TOMLINSON	2025
Sanilac	GREGORY S. ROSS	2027
Shiawassee	THOMAS J. DIGNAN	2025
Tuscola	NANCY THANE	2025
Van Buren	DAVID DiSTEFANO	2025
Washtenaw	DARLENE A. O'BRIEN	2025
Washtenaw	JULIA OWDZIEJ	2027
Wayne	DAVID BRAXTON	2027
Wayne	FREDDIE G. BURTON, Jr.	2025
Wayne	JUDY A. HARTSFIELD	2027
Wayne	TERRANCE A. KEITH	2027
Wayne	MICHAEL J. McCLORY	2023[2]
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	DAVID PERKINS	2025
Wayne	FRANK S. SZYMANSKI	2025
Wexford	EDWARD VAN ALST	2025

[2] From November 1, 2022.

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Clinton	St. Johns	29
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Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	56
Emmet	Petoskey	57
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Suttons Bay	13
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Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	11
Macomb	Mount Clemens	16
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Marquette	Marquette	25
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Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
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Oakland	Pontiac	6
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Osceola	Reed City	49
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Presque Isle	Rogers City	53
Roscommon	Roscommon	34
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AMENDED ADMINISTRATIVE ORDER No. 2020-17

AMENDMENT OF ADMINISTRATIVE ORDER NO. 2020-17

Entered August 10, 2022, effective immediately (File No. 2020-08)—REPORTER.

On order of the Court, the following amendment of Administrative Order No. 2020-17 is adopted, effective immediately.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Administrative Order No. 2020-17 — Continuation of Alternative Procedures for Landlord/Tenant Cases.

~~On order of the Court, Administrative Order No. 2020-17 is hereby amended and replaced with the following new language, effective immediately.~~

[First five paragraphs: unchanged.]

(A)-(D) [Unchanged.]

(E) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing in subsection (B) is conducted. Nothing in this order limits the statutory authority of a judge to adjourn for a longer period. MCL 600.5732. Any party who does not appear at the hearing scheduled for the adjourned date will be defaulted. Cases need not be adjourned for seven days if: the plaintiff

dismisses the complaint, with or without prejudice, and without any conditions;~~,~~ if defendant was personally served under MCR 2.105(A) and fails to appear;~~,~~ if plaintiff pleads and proves, with notice, a complaint under MCL 600.5714(1)(b), (d), (e) or (f), sufficient to meet the statutory and court rule requirements and a judge is available to hear the proofs;~~,~~ or where both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court. Where plaintiff and defendant are represented by counsel, the parties may submit a conditional dismissal or consent judgment in lieu of appearing personally at the second hearing. Nothing in this subsection supersedes the right to an attorney pursuant to 4.201(F)(2).

(F)-(I) [Unchanged.]

This order is effective immediately until further order of the Court.

VIVIANO, J. (*concurring*). Administrative Order No. 2020-17, 505 Mich clii (2020), as amended at 507 Mich cxcvii, ccv-ccvii (2021), currently requires that most landlord-tenant cases be adjourned seven days after the initial court date. Today's amendment adds exceptions to this adjournment requirement for cases in which a plaintiff landlord is seeking to recover possession of the premises due to (1) manufacturing or sale of narcotics on the property, (2) a health hazard or physical injury to the property, (3) threat of or actual physical injury to an individual, or (4) taking or holding possession of the property by force or trespass under MCL 600.5714(1)(b), (d), (e), or (f), respectively. I continue to believe that we should rescind AO 2020-17 in its entirety and return all landlord-tenant cases to the procedures established by our statutes and court rules

for the reasons I have previously stated.[1] However, the Court today is not considering rescission of the entire administrative order. Furthermore, the present revisions to the administrative order will enable landlords to more quickly recover possession of their premises in certain circumstances in which nonpayment of rent is not the basis on which the landlord is seeking to recover possession, which is consistent with MCL 600.5714. For these reasons, although I would prefer to rescind the order in its entirety, I concur in the amendment.

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[1] See Amendment of Administrative Order No. 2020-17, 507 Mich cxxviii, cxxxv (July 2, 2021) (VIVIANO, J., dissenting).

RESCINDED ADMINISTRATIVE ORDER No. 2015-1

RESCISSION OF ADMINISTRATIVE ORDER NO. 2015-1

Entered September 14, 2022, effective September 16, 2022 (File No. 2014-24)—REPORTER.

On order of the Court, effective September 16, 2022, Administrative Order No. 2015-1 (Summary Jury Trial Pilot Project) is rescinded.

MICHIGAN RULE CHANGES

Adopted August 10, 2022, effective September 9, 2022 (File No. 2020-08)—REPORTER.

By order dated July 26, 2021, the Court adopted amendments of Rules 2.002, 2.305, 2.407, 2.506, 2.621, 6.006, 6.106, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules. Notice and an opportunity for public comment having been provided, effective September 9, 2022, the amendments of Rules 2.002, 2.305, 2.407, 6.006, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules are retained and/or further amended as indicated in underlining and strikethrough below; the July 26, 2021 amendments of Rules 2.506, 2.621, and 6.106 are rescinded as indicated in strikethrough below.

On further order of the Court, effective September 9, 2022, the Court adopts additional amendments of Rules 2.402, 3.210, 4.101, 5.140, 6.001, and adds Rule 2.408 of the Michigan Court Rules.

> [Rule 2.408 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.002 WAIVER OF FEES FOR INDIGENT PERSONS

(A)-(K) [Unchanged.]

(L) Notwithstanding any other provision of this rule~~, until further order of the Court~~, courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process.

RULE 2.305 DISCOVERY SUBPOENA TO A NON-PARTY

(A)-(E) [Unchanged.]

(F) Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by telephone or by videoconferencing technology, by two-way interactive video technology, or by other remote participation tools. ~~Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.~~

RULE 2.402 USE OF COMMUNICATION EQUIPMENT

(A) Definition. "Communication equipment" means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other. It does not include use of a remote video platform through an audio-only option.

(B)-(C) [Unchanged.]

RULE 2.407 VIDEOCONFERENCING

(A) Definitions. In this subchapter:

(1) [Unchanged.]

(2) "Videoconferencing" means the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio

microphones, and audio speakers. It includes use of a remote video platform through an audio-only option.

(B) Application.

(1) All proceedings occurring by videoconferencing, including the manner and extent of the use of videoconferencing, are sSubject to requirements, standards, and guidelines published by the State Court Administrative Office and the criteria set forth in subrulesection (C), a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court-scheduled civil proceeding.

(2) Subject to State Court Administrative Office standards, Consistent with these rules and subject to subrule (4), courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings by videoconferencing technology.

(3) [Unchanged.]

(4) Nothing in this rule shall preclude a participant from requesting to physically appear in person for any proceeding. If there is a request to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding. Subject to subrule (5), the court must allow other participants to participate using videoconferencing technology.

(5) Nothing in this rule shall prevent the court from determining that a case is not suited for videoconferencing, and may require any hearing, even a

proceeding categorized as presumptively subject to videoconferencing technology, to be conducted in person.

(a) In determining whether a particular case or proceeding should be conducted by videoconferencing technology or ruling on an objection to the use of videoconferencing technology, the court shall consider the factors listed in subrule (C).

(b) The court shall state its decision and reasoning, either in writing or on the record, when requiring in-person proceedings in each case where there is a presumption for the use of videoconferencing technology.

(6) Courts must provide reasonable notice to participants of the time and mode of a proceeding. If a proceeding will be held using videoconferencing technology, the court must provide reasonable notice of the way(s) to access that proceeding.

(7) Courts must allow a party and their counsel to engage in confidential communication during a proceeding being conducted by videoconferencing technology.

(8) If, during the course of a videoconference proceeding, the court or a participant is unable to proceed due to failure of technology, the court must reschedule the proceeding and promptly notify the participants of the rescheduled date and time and whether the proceeding will be held using videoconferencing technology or in person.

(9) All proceedings that are held using videoconferencing technology or communication equipment must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law.

(10) Courts must provide access to a proceeding held using videoconferencing technology to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.

(C) Criteria for Videoconferencing. In determining in a particular case ~~whether to permit~~ the use of videoconferencing technology and the manner of proceeding with videoconferencing, the court shall consider the following factors:

(1) The capabilities of the court's and the parties to participate in a videoconference~~videoconferencing equipment~~.

(2) Whether a specific articulable~~any undue~~ prejudice would result.

(3) The convenience of the parties and the proposed witness(es), ~~and~~ the cost of producing the witness in person in relation to the importance of the offered testimony, and the potential to increase access to courts by allowing parties and/or their counsel to appear by videoconferencing technology.

(4) [Unchanged.]

(5) Whether the court has reason to believe that the participants in this hearing will not be able to maintain the dignity, solemnity, and decorum of court while using videoconferencing technology, or that the use of videoconferencing technology will undermine the integrity, fairness, or effectiveness of the proceeding.~~Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.~~

(6) [Unchanged.]

(7) Whether the court ~~is satisfied that it~~ can sufficiently control the participants in this hearing or matter~~proceedings at the remote location~~ so as to effectively extend the courtroom to the remote location.

(8) [Unchanged.]

~~(9) Whether the use of videoconferencing technology diminishes or detracts from the dignity, solemnity, and formality of the proceeding and undermines the integrity, fairness, or effectiveness of the proceeding.~~

(10)-(13) [Renumbered (9)-(12) but otherwise unchanged.]

(D) Request for Videoconferencing and Participant Contact Information.

(1) [Unchanged.]

(2) A participant who will be using~~requests the use of~~ videoconferencing technology must provide the court with ~~the videoconference dialing information and~~ the participant's contact information, including mobile phone number(s) and email address(es), in advance of the court date when videoconferencing technology will be used. A court may collect the contact information using an SCAO-approved form. The contact information form used under this provision shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.

(3) [Unchanged.]

~~(E) Objections. The court shall rule on an objection to the use of videoconferencing under the factors set forth under subsection C.~~

~~(F) Mechanics of Videoconferencing. The use of any videoconferencing technology must be conducted in accordance with standards published by the State Court Administrative Office. All proceedings at which~~

~~videoconferencing technology is used must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law.~~

(E~~G~~) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended. ~~and trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible. In doing so, courts must:~~

~~(1) Verify that participants are able to proceed remotely, and provide reasonable notice of the time and format of any such hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in such proceedings.~~

~~(2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.~~

~~(3) Ensure that any such proceedings are consistent with a party's Constitutional rights, and allow confidential communication between a party and the party's counsel.~~

~~(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.~~

~~(5) Ensure that the manner in which the proceeding is conducted produces a recording sufficient to enable a transcript to be produced subsequent to the proceeding.~~

~~(6) Ensure that any such remote hearings comply with any standards promulgated by the State Court Administrative Office for conducting these types of proceedings.~~

~~(7) Waive any fees currently charged to allow parties to participate remotely.~~

~~Courts may collect contact information, including mobile phone number(s) and email address(es) from any party or witness to a case to facilitate scheduling of and participation in remote hearings or to otherwise facilitate case processing. A court may collect the contact information using a SCAO-approved form. The contact information form used under this provision to collect the information shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.~~

RULE 2.408 USE OF VIDEOCONFERENCING TECHNOLOGY IN CIVIL CASES

(A) Generally.

(1) A court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any civil proceeding.

(2) Except as otherwise provided in this subrule, the use of videoconferencing technology shall not be used in bench or jury trials, or any civil proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and opportunity to be heard on the use of videoconferencing technology.

While Administrative Order No. 2020-17 is in effect, it controls the mode of landlord-tenant proceedings.

(3) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402.

(B) Use of Videoconferencing Technology in Circuit Court. Subject to a determination by the court that the use of videoconferencing technology is inappropriate for a particular case under an analysis as contained in MCR 2.407(C), the use of videoconferencing technology shall be presumed for:

(1) civil pretrials;

(2) early scheduling conferences under MCR 2.401(B);

(3) motions filed pursuant to MCR 2.119 regarding discovery;

(4) adjournments;

(5) modifications to scheduling orders;

(6) motions in limine;

(7) postjudgment collection or discovery matters;

(8) testimonial proofs for hearings under MCR 3.210(A)(4);

(9) motions to correct, strike, or amend pleadings; and

(10) motions pursuant to MCR 2.116.

(C) Use of Videoconferencing Technology in District Court. Subject to a determination by the court that the use of videoconferencing technology is inappropriate for a particular case under an analysis as contained in MCR 2.407(C), the use of videoconferencing technology shall be presumed for:

(1) civil pretrials;

(2) early scheduling conferences under MCR 2.401(B);

(3) motions filed pursuant to MCR 2.119 regarding discovery;

(4) adjournments;

(5) postjudgment collection matters; and

(6) motions to correct, strike, or amend pleadings.

RULE 2.506 SUBPOENA; ORDER TO ATTEND

(A)-(I) [Unchanged.]

~~(J) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.~~

RULE 2.621 PROCEEDINGS SUPPLEMENTARY TO JUDGMENT

(A)-(B) [Unchanged.]

(C) Subpoenas and Orders. A subpoena or order to enjoin the transfer of assets pursuant to MCL 600.6119 must be served under MCR 2.105. The subpoena must specify the amount claimed by the judgment creditor. The court shall endorse its approval of the issuance of the subpoena on the original subpoena, which must be filed in the action. The subrule does not apply to subpoenas for ordinary witnesses. ~~Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.~~

(D)-(H) [Unchanged.]

RULE 3.210 HEARINGS AND TRIALS

(A) In General.

(1)-(3) [Unchanged.]

(4) Testimony must be taken in person, except as provided in MCR 2.408(B) or when the court may otherwise ~~that the court may~~ allow testimony to be taken by telephone in extraordinary circumstances, or by videoconferencing technology under MCR 2.407 and MCR 2.408.

(B)-(E) [Unchanged.]

RULE 4.101 CIVIL INFRACTION ACTIONS

(A) [Unchanged.]

(B) Appearances; Failure to Appear; Default Judgment.

(1) Depending on the nature of the violation and on the procedure appropriate to the violation, a defendant may appear in person, by videoconferencing technology, by representation, or by mail.

(2)-(6) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Contested Actions; Notice; Defaults.

(1)-(3) [Unchanged.]

(4) For any hearing held under this subchapter and subject to~~, in accordance with~~ MCR 2.407(B)(5)~~, the court may allow~~ the use of videoconferencing technology to conduct remote proceedings is presumed~~by any participant as defined in MCR 2.407(A)(1)~~.

(G)-(H) [Unchanged.]

RULE 5.140 USE OF VIDEOCONFERENCING TECHNOLOGY

(A)-(B) [Unchanged.]

(C) In a proceeding concerning a conservatorship, guardianship, or protected individual, if the subject of the petition wants to be physically present, the court must allow the individual to be present. The right to be present for the subject of a minor guardianship applies only to a minor 14 years of age or older. Subject to this right to be present and to MCR 2.407(B)(5), the use of videoconferencing technology is presumed in all uncontested petitions or motions in guardianship, conservatorship, protected individual and decedent estates.

(D) [Unchanged.]

RULE 6.001 SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES

(A) Felony Cases. The rules in subchapters 6.000-6.500, except MCR 6.006(C), govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction.

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006(A) and (C)-(E), 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.006 VIDEO AND AUDIO PROCEEDINGS

(A) Generally.

(1) Except as otherwise provided by this rule, the use of videoconferencing technology under this rule is subject to MCR 2.407.

(2) A court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding.

(3) When determining whether to utilize videoconferencing technology, the court shall consider constitutional requirements, in addition to the factors contained in MCR 2.407.

(4) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402.

(B) Mode of Proceedings in Cases Cognizable in the Circuit Court

(1) Generally. Circuit courts may use videoconferencing technology to conduct any non-evidentiary or trial proceeding.

(2) Preferred Mode. The use of videoconferencing technology shall be preferred for the following proceedings:

(a) initial arraignments on the information;

(b) pretrial conferences;

(c) motions pursuant to MCR 2.119; and

(d) pleas.

As used in this subrule, "preferred" means scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq*., or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5).

(3) Presumed Mode. In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed.

(4) Trials. Notwithstanding any other provisions of these rules, the use of videoconferencing technology shall not be used in bench or jury trials, or any proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology.

(5) In-Person Demand. Nothing in this rule prevents a defendant, who otherwise has the right to appear in person, from demanding to physically appear in person for any proceeding. If there is a demand to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding. Subject to MCR 2.407(B)(5), the court must allow other participants to participate using videoconferencing technology.

(C) Mode of Proceedings in Cases Cognizable in the District and Municipal Court

(1) Preferred Mode. The use of videoconferencing technology shall be the preferred mode for conducting arraignments and probable cause conferences for in custody defendants. As used in this subrule, "preferred" means scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq*., or a determina-

tion by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5).

(2) Presumed Mode. In all other criminal proceedings, the in-person appearance of parties, witnesses, and other participants is presumed.

(3) Videoconferencing Technology Prohibited. Notwithstanding any other provision of these rules and subject to constitutional rights, the use of videoconferencing technology shall not be used in evidentiary hearings, bench trials or jury trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court.

(4) Preliminary Examination. Notwithstanding anything herein to the contrary, as long as the defendant is either present in the courtroom or has waived the right to be present, district courts may use videoconferencing to take testimony from any witness in a preliminary examination.

~~(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, waivers and adjournments of preliminary examinations, and hearings on postjudgment motions to amend restitution.~~

~~(B) Defendant in the Courtroom — Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be~~

~~present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.~~

~~(C) Defendant in the Courtroom — Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use videoconferencing technology to take testimony from a person at another location in the following proceedings:~~

~~(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;~~

~~(2) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.~~

(D) [Unchanged.]

(E) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended ~~and trial courts are required to use remote participation technology (videoconferencing under MCR 2.407 or telephone conferencing under MCR 2.406) to the greatest extent possible. Any such proceedings shall comply with the requirements set forth in MCR 2.407(G)~~.

RULE 6.106 PRETRIAL RELEASE

(A) In general. At the defendant's arraignment on the complaint and/or warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1)-(3) [Unchanged.]

~~(4) Notwithstanding any other provision in this rule, until further order of the Court, in addition to giving consideration to other obligations imposed by law, trial courts are urged to take into careful consideration local public health factors in making pretrial release decisions, including determining any conditions of release, and in determining any conditions of probation.~~

(B)-(I) [Unchanged.]

RULE 8.110 CHIEF JUDGE RULE

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(2) [Unchanged.]

(3) As director of the administration of the court, a chief judge shall have administrative superintending power and control over the judges of the court and all court personnel with authority and responsibility to:

(a)-(h) [Unchanged.]

(i) perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule. As part of this obligation, the court shall continue to take reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to COVID-19. Such measures include continuing to provid~~ing~~ a method or methods for filers to submit pleadings and other filings other than by personal appearance at the court. In addition,

courts may waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements as necessary.

~~To evaluate the effectiveness of the practices adopted by the Supreme Court as emergency measures during the recent pandemic, and consistent with the advisement under (C)(1) to solicit input from other judges in the jurisdiction, each court's leadership team (including the chief judge(s) and court administrator(s)) shall convene a meeting to discuss the court's ability to manage operations during the pandemic and also identify potential permanent changes that might improve court processes. The State Court Administrative Office will provide guidance regarding the meetings to be held. The meeting shall include (but not be limited to) representatives from the following stakeholders:~~

~~(i) court funding unit~~

~~(ii) local bar association~~

~~(iii) local legal aid organization~~

~~(iv) regional administrator~~

~~(v) state and local government agencies active in the court (e.g., Michigan Department of Health and Human Services, law enforcement, friend of the court, etc.)~~

~~(vi) nongovernment agencies with interests in court proceedings, such as crime victim advocacy organizations, nonprofit safety net entities, including the local Housing Assessment Resource Agency, and others as reflective of the local community.~~

~~This meeting shall be held by September 17, 2021, and a summary of the discussion and proposed recommendations shall be transmitted to the regional office within two weeks after the meeting. Courts must~~

~~accept written comments submitted by any of the entities listed above, and include those comments as an appendix to its summary.~~

(4)-(9) [Unchanged.]

(D) [Unchanged.]

RULE 9.112 REQUESTS FOR INVESTIGATION

(A)-(C) [Unchanged.]

(D) Subpoenas.

(1)-(4) [Unchanged.]

(5) Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by telephone or by videoconferencing technology~~, by two-way interactive video technology, or by other remote participation tools~~. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.

RULE 9.115 HEARING PANEL PROCEDURE

(A)-(H) [Unchanged.]

(I) Hearing; Contempt.

(1)-(3) [Unchanged.]

(4) Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by telephone or by videoconferencing technology~~, by two-way interactive video technology, or by other remote participation tools~~. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.

(J)-(M) [Unchanged.]

RULE 9.221 EVIDENCE

(A)-(B) [Unchanged.]

(C) Issuance of Subpoenas. The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a respondent under investigation. Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by telephone or by videoconferencing technology~~, by two-way interactive video technology, or by other remote participation tools~~. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.

(D)-(E) [Unchanged.]

Staff Comment (ADM File No. 2020-08): After careful consideration of public comment at the Court's March 16, 2022 public administrative hearing, these amendments reflect a balance between providing consistent practices throughout Michigan's judiciary and retaining judicial discretion to determine what is best for each case or proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MCCORMACK, C.J. (*concurring*). The COVID-19 pandemic required us to think creatively about how to keep Michigan's courts running safely. In the spring of 2020, we issued an administrative order requiring judges to "make a good faith effort to conduct proceedings remotely" when possible through two-way interactive videoconferencing technology. Administrative

Order No. 2020-6, 505 Mich cxxxiv, cxxxv (2020). The purpose of this administrative order, and others we issued in response to the pandemic, was to keep litigants and court employees safe. Like businesses and many other institutions, courts had to find ways to adapt to the challenges of the pandemic.

We've learned in the two years since that remote proceedings vastly improved access to the courts, and thus access to justice. These amendments will ensure that remote access to our courts is consistently available across the state moving forward. Given the overwhelmingly positive response from stakeholders who provided us with helpful comments along the way, I write to express my enthusiastic support for the improved access to justice these amendments will provide to Michiganders, especially for those who need justice most.

The amendments make remote judicial proceedings the presumptive norm in many proceedings, providing much needed consistency across courts for court users. Any participant in a lawsuit can still request to appear in person for any proceeding, however, and that request must be honored. MCR 2.407(B)(4) ("If there is a request to appear in person, . . . the presiding judge and any attorney of record for said participant *must* appear in person with the participant for said proceeding.") (emphasis added). In addition, courts will retain the discretion to decide that remote appearance is inappropriate for a particular hearing and require participants to appear in person, even if the proceeding is presumptively subject to videoconferencing technology. MCR 2.407(B)(5). That is, while these amendments ensure remote proceedings are available, they require neither courts nor litigants to adhere to a remote option where it would be inappropriate or

undesirable to a participant in the proceeding. It is therefore simply false for Justice ZAHRA to state that the amendments strip trial courts of discretion to decide when and how to conduct remote proceedings.

These amendments are the result of the most inclusive development process in decades, perhaps longer. The State Court Administrative Office created the Lessons Learned Committee in May 2020 to assess the trial court system's emergency preparedness and response, including the widespread use of remote proceedings. In June 2021, Lessons Learned released its preliminary findings to the public *with a request for comment and feedback*. Lessons Learned surveyed responses from judges, court administrators and staff, attorneys, associations, and other court users; 128 participants submitted a total of 336 comments that covered both positive and negative experiences during the pandemic and with remote proceedings. Synthesizing the information gathered from these comments, Lessons Learned concluded that remote hearings should continue. See State Court Administrative Office, Lessons Learned Committee, *Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021* (November 19, 2021), available at <https://www.courts.michigan.gov/4afc1e/siteassets/covid/lessons-learned/final-report-lessons-learned-findings-best-practices-and-recommendations-111921.pdf> (accessed August 1, 2022) [https://perma.cc/Y8PN-4HH7].

The vast majority of those who submitted feedback throughout this process—including individuals representing 36 district courts, 17 circuit courts, 9 probate courts, 2 tribal courts, and 1 friend of the court—supported the continued use of remote proceedings in some form. *Id*. at 1, 29-30.

And, on July 26, 2021, the Court enacted interim court rules governing remote proceedings and invited public comment. We received 41 written comments and heard from 49 people at our March 16, 2022 public hearing. This alone is more public input than the Court has received for any other issue during my nine and a half years of service. Additionally, every trial court met with local stakeholders to gather local feedback. More than 2,000 people across the state participated.

Given all this input, I respectfully disagree with Justice VIVIANO that the public was unaware that the Court was considering changes or that the Court did not receive public input before adopting these rules. Rather, today's new and amended rules reflect that we have listened to and learned from the feedback we have received from court users.

As I have said many times, Michigan courts and the people they serve should be proud of what has been accomplished over the past two years. Instead of being paralyzed by the global pandemic, judges and court administrators rose to overcome the challenges that delivering justice required. And while these changes made people safer during a global pandemic and kept our judicial system running, making some of them lasting will result in undeniable, vast, and long-term benefits to the public.

Equal access to justice is the most critical problem for the fair administration of our courts. Before the pandemic, "[c]ourts were falling short in meeting their mission to provide access to justice for all, and particularly so when it [came] to addressing the needs of lower-income and minority communities." Michigan Justice for All Task Force, *Strategic Plan and Inventory Report* (December 2020), p 2, available at <https://www.courts.michigan.gov/4af54d/siteassets/

committees,-boards-special-initiatves/justiceforall/final-jfa-report-121420.pdf> (accessed August 1, 2022) [https://perma.cc/2BFL-WFBK]. Indeed, surveys showed that "nearly nine in ten low-income individuals with a civil legal problem receive[d] little or no legal help" in trying to navigate the justice system. *Id*.

Remote access to court hearings during the pandemic has allowed more people to get legal representation, and it has reduced the costs—financial and otherwise—of litigation. By cutting travel time and time spent in courthouses waiting for hearings to begin, attorneys can appear in courts in multiple counties on the same day. Lawyers can serve more clients, increasing the legal community's capacity to meet the needs of the most disadvantaged litigants and communities.

The benefits are even more impactful for those who can't afford lawyers—the vast majority of litigants who need and use courts. People who would have missed a court date because they lacked access to transportation or could not afford to miss work will be spared the consequences of failing to appear—jail, fines, lost housing, separated families, and more debt. Default judgments, which data show plummeted during the pandemic, will remain lower.

These benefits, which we have seen firsthand here in Michigan, have now been well documented. Interviews with judges who oversee child welfare courts found that parents, foster parents, and kinship caregivers appeared more often at virtual proceedings than live, and they attributed that increase in part to not having to travel, find parking, or miss work. See National Center for State Courts, *Study of Virtual Child Welfare Hearings: Impressions from Judicial Interviews*

(June 2021), available at <https://www.ncsc.org/__data/assets/pdf_file/0018/65520/Study-of-Virtual-Child-Welfare-Hearings-Judicial-Interviews-Brief.pdf> (accessed August 1, 2022) [https://perma.cc/EC5L-CEMG]. An analysis of the relevant data by the Michigan Supreme Court's Statistical Research Team conducted in October 2021 showed that the percentage of Michigan civil cases ending in default judgment fell by 16.9% from 2019 to 2021. See Memorandum from Laura Hutzel and Dian Gonyea to Tom Boyd (October 27, 2021) (on file with the Michigan Supreme Court), p 2. And the data showed a 38% decrease in the percentage of defaults in landlord-tenant cases during the same period. See Michigan Justice for All Commission, *Annual Report 2021*, p 5, available at <https://www.courts.michigan.gov/49c722/siteassets/reports/special-initiatives/final-2021-jfac-annual-report.pdf> (accessed August 1, 2022) [https://perma.cc/N2D7-6ZG2]; January Advisors, *Preliminary Data on LT Default Rates* (January 26, 2022), available at <https://www.courts.michigan.gov/4a18a9/siteassets/court-administration/resources/preliminary-data-on-lt-default-rates.pdf> (accessed August 1, 2022) [https://perma.cc/44WE-JD6T]. See also Hoffman and Strezhnev, *Longer Trips to Court Cause Evictions* (U of Penn Carey Law School, Inst for Law & Econ, Research Paper No. 22-29, 2022), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130696> (accessed August 1, 2022) [https://perma.cc/ML85-V9N4] (empirical data showing that the farther tenants lived from the courthouse, the more likely they were to be defaulted and lose their home). Data from other states also show that default rates drop with remote hearings. See Joint Technology Committee, *Judicial Perspectives on ODR and Other Virtual Court Processes* (May 18, 2020), available at <https://www.ncsc.org/__data/

assets/pdf_file/0023/3487020-05-18-Judicial-Perspectives.pdf> (accessed August 1, 2022) [https://perma.cc/558K-YD7S].

Virtual proceedings have enormous efficiency benefits for courts, too. Because of a decrease in missed court dates, judges reschedule fewer hearings, issue fewer bench warrants and contempt orders, and assess fewer fines and fees for failure to appear.

Finally, these amendments will continue the increased transparency we gained from remote proceedings. Since March 2020, judges, magistrates, and referees have presided over more than 6 million hours of online court proceedings that were broadcast so the public could witness them. The public has accessed live virtual proceedings on the State Court Administrative Office's Virtual Courtroom Directory more than 560,000 times. Local trial court YouTube channels have nearly 220,000 subscribers, and trial court videos have millions of views. Michiganders are participating in their judicial system like never before.

Public trust is the judiciary's only currency, and it is eroding. The National Center for State Courts' annual survey demonstrates that public trust in state courts has dropped by 12 percentage points since 2018, and the percentage of the public that believes the courts provide "equal justice to all" has declined steadily since 2014. See National Center for State Courts, *State of the State Courts: 2021 Poll* (2021), pp 5-6, available at <https://www.ncsc.org/__data/assets/pdf_file/0020/70580/SSC_2021_Presentation.pdf> (accessed August 1, 2022) [https://perma.cc/563F-N4SH]. Improved access to justice, consistency, and transparency are critical components for creating and maintaining public trust and confidence.

As Justice VIVIANO correctly observes, these rules make remote proceedings a "default" in many cases, but not a requirement for any case. And as noted above, baked into the amendments is the option for a litigant to request in-person proceedings. See MCR 2.407(B)(4). This should assuage Justice BERNSTEIN's fair concern that some litigants might lack the resources or skills to use videoconferencing technology. And no rule adopted today prevents a judge from determining that a proceeding should be held in person. Compare MCR 2.407(B)(5) and (C) with MCR 2.407(B)(4) and MCR 2.408(A)(2).

But consistency from court to court, where practical, is good government. Court users should not have to navigate different rules for appearances from courtroom to courtroom and pay the costs for misnavigating hodgepodge processes. A judge-by-judge approach to remote proceedings might serve individual judges, but it does not serve the public.

Moreover, I disagree with Justice VIVIANO's and Justice BERNSTEIN's suggestion that trial judges largely oppose remote proceedings. We don't have to guess—they told us in 2021. In fact, 84% of district court judges surveyed by the Michigan District Judges Association (MDJA) believe they have found a proper balance between remote and in-person proceedings under the current rule, which requires remote proceedings to the maximum extent possible. Michigan District Judges Association, *Online Survey of Judges with District Court Dockets: Executive Summary and Demographic Analysis* (October 2021), p 12, available at <https://www.courts.michigan.gov/4a236c/contentassets/e636e8ac7b40411d98206f933c7b8257/approved/2020-08_2022-07-29_mdjasurveyreport.pdf> (accessed August 1, 2022) [https://perma.cc/SGG5-5F7S]. And 90% of dis-

trict court judges said they intend to use remote proceedings going forward for certain proceedings, even in the absence of a mandate. An MDJA work group submitted proposed rules very similar to the ones we adopt today as part of the extensive comment process.

Continued remote proceedings can also be a part of the solution to trial court backlogs, because they increase capacity: visiting judges can conduct remote proceedings for matters that are suited for them, freeing up physical courtrooms for jury trials and other proceedings that are better handled in person. The efficiency with which remote proceedings are conducted will only improve over time as courts, attorneys, litigants, and other stakeholders become more familiar with new processes and new technologies.

I also respectfully disagree with Justice VIVIANO that the Court is moving faster with respect to adopting remote hearings than the rest of the country. To the contrary, some states have already developed detailed reports and are considering or have adopted similar rules for remote proceedings. Earlier this year, the Minnesota Supreme Court implemented a uniform process for determining which hearings will be held remotely and which will be held in person. See Minnesota Supreme Court, Administrative Order No. 20-8001 (2020), available at <https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/Administrative-Order-Continuing-Operations-of-the-Minnesota-Judicial-Branch-Under-Emergency-Executive-Order-No-20-33.pdf> (accessed August 1, 2022) [https://perma.cc/3L8C-Z57P]; Minnesota Judicial Branch Policy and Procedures, *oneCourtMN Hearings Initiative Policy* (June 6, 2022), available at <https://www.mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/525.pdf> (accessed

August 1, 2022) [https://perma.cc/Q5US-EW9W]. In February 2022, the Arizona Supreme Court issued a report recommending the permanent implementation of remote hearings for many types of proceedings, and in April it adopted these recommendations. See Arizona Supreme Court, *Recommended Remote and In-Person Hearings in Arizona State Courts in the Post-Pandemic World* (February 22, 2022), available at <https://www.ncsc.org/__data/assets/pdf_file/0029/75809/Recommended-Remote-and-In-Person-Hearings-in-Arizona-State-Courts-in-the-Post-Pandemic-World-2222022-FINAL.pdf> (accessed August 1, 2022) [https://perma.cc/U6PQ-G8EC]; Arizona Supreme Court, Administrative Order No. 2022-46 (2022), available at <https://www.azcourts.gov/Portals/22/admorder/Orders22/2022-46.pdf?ver=f3gtG-_i2Cq8bm4KQbxo1Q%3d%3d> (accessed August 1, 2022) [https://perma.cc/C3M8-XAG8]. And both the New Jersey and Maryland Supreme Courts have authorized frameworks for approaching consistency for remote proceedings. See Supreme Court of New Jersey, *Notice to the Bar and Public: Future of Court Operations —Continuation of Both In-Person and Virtual Court Events* (November 18, 2021), available at <https://www.njcourts.gov/notices/2021/n211118a.pdf?c=A4s> (accessed August 1, 2022) [https://perma.cc/PN8G-QH2X]; Maryland Courts, *Maryland Judiciary Adopts Recommendations and Releases Report From Joint Subcommittee on Post COVID-19 Judicial Operations* (March 31, 2022), available at <https://www.courts.state.md.us/media/news/2022/pr20220331> (accessed August 1, 2022) [https://perma.cc/5QHT-RWHT]. So we are not the first to adopt remote proceedings rules, but we should not be the last. Michigan can and should lead.

That the rules we adopt today differ from the interim rules is not unusual. We seek comments to

proposed rules so that we can learn from them and make changes based on what we learn. This is exactly what has happened here. The extensive feedback we received led us to these specific rules, just as comments in other administrative rule change proposals led us to adopt different rules than those we published for comment. See, e.g., ADM File No. 2020-17 (adding Rule 3.906 to the Michigan Court Rules to govern the use of restraints on juveniles offenders during court proceedings, but providing courts more discretion to decide when restraints are necessary than the proposed rule that was published for comment); ADM File No. 2018-25 (amending MCR 7.312 to codify the briefing requirements for cases to be argued on the application, while declining to adopt some amendments that had been published for comment and adopting additional amendments that had not been included when the proposed rule was published for comment). See also ADM File No. 2019-03; ADM File No. 2015-14.

As always, every rule adopted today can be amended if we learn there are better ways to approach remote proceedings or aspects of the new rule that are not working as well as they should be. The rules and processes that govern our courts' work should always be improving to better serve the public.

Access to justice for all requires expanding what the delivery of justice looks like. A modern justice-delivery system will be different than when many of our courthouses were built, but that does not mean it is the enemy of decorum. Michigan's judges have many tools at their disposal to maintain decorum in physical and virtual courtrooms. Delivering justice to the people of Michigan in 2022 requires us to use and refine every tool we have and to keep creating new ones.

The legal profession has been notoriously slow to embrace change. But it's time to keep moving forward, not back. Every other institution and industry in our country is doing exactly that—changing their practices for the better based on lessons learned these past two years. The modern workforce will never return to its February 2020 norms. More of our personal and work lives will be conducted in a virtual format. Business travel, education, and healthcare will never be the same.

Courts, too, must continue to evolve. The judiciary should not and cannot be the only institution that does not benefit from the lessons learned from the COVID-19 pandemic and the accelerated innovation it brought. More importantly, the public who have traditionally been excluded from full participation in many of our courts should not lose a valuable new tool for accessing justice. Ours is a government instituted for the *people*, after all.

ZAHRA, J. (*dissenting*). On July 26, 2021, this Court rescinded most of the emergency orders issued in response to the COVID-19 pandemic.[1] However, some of the emergency orders were not rescinded, including those that required courts to "make a good faith effort to conduct proceedings remotely"[2] when possible through two-way interactive videoconferencing technology. The Court promulgated these emergency orders as interim court rules which were given immediate effect, with public comment only accepted after these rules were in effect. I dissented because there was no longer an emergency to justify the summary implementation of these interim court rules without

[1] Rescission of Pandemic-Related Administrative Orders, 507 Mich cxcvii (2021).

[2] See Administrative Order No. 2020-6, 505 Mich cxxxi (2020).

public comment. I believed that these "concerns merit[ed] public attention before considering even interim court rules, which, more often than not, load the dice toward their later adoption as permanent court rules."[3]

So, it should not be a surprise that the same justices who sought to give immediate effect to emergency interim courts rules now seek to make those court rules permanent. If Chief Justice MCCORMACK is correct that "[p]ublic trust is the judiciary's only currency," the Court's imprudent approach to promulgating these once-emergency orders into permanent court rules when the emergency no longer exists certainly does not bolster the Court's credibility. And far from demonstrating to the public this Court's confidence in our trial courts, the majority now makes additional changes to these court rules that undermine that confidence. The majority for all intents and purposes strips our trial courts of the discretion to decide when and how best to conduct remote proceedings.[4] In addition, the majority's changes that relate to landlord-tenant proceedings are particularly egregious in that they permanently strip trial courts of discretion that the Legislature provided them through a statutory framework in which a landlord may obtain a judgment against a defaulting tenant.[5]

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[3] Rescission of Pandemic-Related Administrative Orders, 507 Mich at ccxiii (ZAHRA, J., dissenting).

[4] The permanent court rule provides that "the use of videoconferencing technology shall be presumed . . . ." MCR 2.408(B) and (C).

[5] See Amended Administrative Order No. 2020-17, 507 Mich xcix, ci-ciii (2021) (ZAHRA, J., dissenting).

Chief Justice MCCORMACK's claim that I falsely state that the "amendments strip trial courts of discretion to decide when and how to conduct remote proceedings" is humorous. In the same passage, she admits that remote proceedings are now "the presumptive norm in many proceedings[.]" She then hides this presumption behind a fig leaf by mentioning

As I previously wrote in terms of remote proceedings:

> A perfect solution is not at hand. Like most matters that end up in this tribunal, there are competing interests at stake, and we should not treat this as an all or nothing proposition. Remote hearings provide an opportunity to increase access to justice. This is no small matter. At the same time, remote hearings deny trial courts their full authority to maintain the dignity and proper decorum of the court. The courtroom—with the judge perched on a bench, the call of the court crier to open court and call cases, and the ceremony and ritual of live court proceedings—affords trial courts with authority that is conspicuously absent from video proceedings. It cannot be denied that there is an increased risk that litigants participating remotely will make a mockery of court proceedings, with the court having little to no remedy available to sanction such disruptive conduct.[6]

I strongly disagree with Chief Justice MCCORMACK that these new rules promote "good government." As one of only two justices on the Court to have served as a trial court judge, I firmly believe that the better approach is to trust our trial courts. The trial courts of this state have the authority to implement video proceedings under our current rules. The emergency brought about by the pandemic forced trial courts to use videoconferencing technology in ways not previously utilized. Our trial courts learned when videoconferencing aids in the administration of justice, and when it does not. Good government results when trial judges elected by the people within their respective

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that "[a]ny participant in a lawsuit can still request to appear in person . . . ." This vests discretion not with the trial court but with the litigants, who care only about their personal interest and not the interest of justice. The Chief Justice's claim of falseness rings hollow.

[6] Rescission of Pandemic-Related Administrative Orders, 507 Mich at ccxii-ccxiii (ZAHRA, J., dissenting).

jurisdictions are vested with the discretion to decide when the use of remote proceedings best serves the interests of justice. I would therefore leave it to the discretion of our trial courts as to when and where best to use these tools. I trust our trial courts to implement these procedures as needed and where such proceedings benefit our judicial process. The Court should likewise demonstrate this confidence in our judicial system. Accordingly, I dissent.

VIVIANO, J. (*dissenting*). Although I have disagreed with a fair amount of this Court's administrative decision-making in the past two years—including, most emphatically, its management of the COVID-19 pandemic—no single decision will cause more harm to the court system than today's reckless and irresponsible decision to make remote court hearings the default in Michigan. Today's order will ensure that the participants in court hearings are less engaged and the hearings less meaningful. As a result, the quality of justice dispensed by our courts will inevitably decline. As a former trial judge who values human interaction and knows the court system cannot function well without it, I am greatly saddened by the majority's profound error in judgment and what it portends for the future of our courts.

I. PROCEDURAL HISTORY

In March 2020, after Governor Whitmer declared a state of emergency in response to the COVID-19 pandemic, we began issuing administrative orders governing how courts should operate during the pandemic. See, e.g., Administrative Order No. 2020-1, 505 Mich xcix (2020). This included administrative orders directing that courts, to the extent possible, conduct many types of hearings remotely. See, e.g., Administrative

Order No. 2020-2, 505 Mich cii (2020). On April 7, 2020, we issued Administrative Order No. 2020-6, which expanded the authority of judges to conduct proceedings remotely and required them "to make a good faith effort to conduct proceedings remotely whenever possible." Administrative Order No. 2020-6, 505 Mich cxxxi (2020). At the time, I supported those emergency administrative orders because I believed they represented our best efforts to respond to the COVID-19 pandemic and the impacts that it had on our court system.[1]

Administrative Order No. 2020-6 remained in effect until July 2021, when the Court rescinded it, and a number of our other pandemic-related administrative orders, and issued an order that gave immediate effect to a broad group of court rule amendments related to remote proceedings. Rescission of Pandemic-Related Administrative Orders, 507 Mich cxcvii (2021). Although the amendments made changes to the court rules, those changes were obviously intended to be of limited duration because the amendments referred to the ongoing COVID-19 pandemic and many of the changes were effective "until further order of the court." The Court concurrently published the amendments for comment and provided notice that a public hearing on the amendments would be held at a later date. Justice BERNSTEIN and I dissented in part from that order, explaining why we believed it was time for the Court to stop administering our state courts by issuing emer-

[1] A number of our early administrative orders also relied on Governor Whitmer's executive orders that were validly issued under the Emergency Management Act, MCL 30.401 *et seq*. But later administrative orders relied on executive orders that were issued under the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., which we subsequently held were invalid and "of no continuing legal effect." *House of Representatives v Governor*, 506 Mich 934, 934 (2020).

gency orders and instead return to in-person proceedings as much and as quickly as possible. *Id*. at ccxiii (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part).

The public hearing regarding whether to retain the July 2021 amendments was held on March 16, 2022. We received 41 written comments and heard from 49 individuals at the public hearing. Although a few individuals were supportive of the amendments, the vast majority of judges who provided comments, as well as the Prosecuting Attorneys Association of Michigan, the State Appellate Defender Office, victim advocacy groups, advocacy groups for self-represented litigants, and various State Bar committees, were opposed to the proposed amendments.

After the public hearing was held, a brand new set of potential amendments materialized for the Court's consideration. Unlike the July 2021 amendments, these proposed significant and permanent expansions of mandated remote hearings. This proposal was never published for comment and was never considered at a public hearing. Indeed, the public was not even aware that the Court was considering making sweeping permanent changes to how our courts operate until Justice BERNSTEIN and I published an op-ed informing the public that the Court would be considering a set of amendments different from those published for comment. See Bernstein & Viviano, *Opinion: People Deserve Their Post-Pandemic Day in Court*, The Detroit News (March 29, 2022), available at <https://www.detroitnews.com/story/opinion/2022/03/30/michigan-courts-should-dispense-justice-person-post-covid/7203119001> (accessed July 7, 2022) [https://perma.cc/7TUS-5DVB]. It is this new set of

court rule amendments, which have been shielded from public view, that the Court is adopting today.

II. DISCUSSION

A. WHY THE CHANGES NOW BEING ADOPTED ARE A BAD IDEA

The amendments the Court adopts today will significantly change how our courts operate on a daily basis. Under the new rules, there will be a presumption that many criminal and most civil proceedings should be held remotely.[2] While some of the proceedings presumed to be held remotely are relatively inconsequential, such as scheduling conferences and adjournments, others are the most significant hearings that will be conducted in many cases, including oral argument on motions for summary disposition in circuit court civil cases and pleas in felony criminal cases. And because trial courts must state on the record or in writing the reasons for deviating from this presumption, the decision to hold an in-person hearing will now be grounds for appeal. The new rules thus promise to formalize the new regime of remote proceedings this Court has foisted upon our frontline courts and to saddle appellate courts with satellite litigation unrelated to the merits of a case.

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[2] For example, the amendments establish a "preference" that a number of criminal hearings be conducted remotely, including the initial arraignment on the information, pretrial conferences, and felony plea hearings. See MCR 6.006(B)(2). And trial judges are now specifically allowed to conduct remote civil and criminal bench or jury trials over the parties' objections. See MCR 2.408(A)(2); MCR 6.006(B)(4). In addition, MCR 2.408(B) now contains a presumption that oral argument on motions for summary disposition in civil cases be held remotely. These dispositive motions are arguably the most important proceeding in a civil case other than the trial itself, and many cases are resolved at the summary-disposition stage.

This revolution in the daily functioning of our courts is not a good thing. It should go without saying—or, at least, it used to—that the most important interactions in people's lives have always occurred in the real world.[3] For litigants, that means appearing in the local courthouse and in the judge's physical courtroom.[4] As Justice BERNSTEIN and I have stated previously,

> Courthouses have always had symbolic importance in our society. They are in the center of every local community, and the courthouse itself reinforces the importance of what occurs within its walls. From judges to court staff, attorneys and litigants, jurors and other members of the public—attending court is and always should be a meaningful experience. The majesty of the court and the solemnity of the proceedings are essential to this process. [*Opinion: People Deserve Their Post-Pandemic Day in Court*.]

This is not a new concept: "centuries of tradition . . . have placed courtrooms and courthouses at the center of the judicial process." Rescission of Pandemic-Related Administrative Orders, 507 Mich at

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[3] See Varadarajan, *Can America's Cities Make a Post-Pandemic Comeback?* Wall Street Journal (May 27, 2022) ("Zoom and hybrid work may be here to stay, [Professor Edward Glaeser] allows. 'But for most of us the most important interactions of our lives will occur in the real world and, consequently, location remains absolutely critical.' "), available at <https://www.wsj.com/articles/big-cities-will-suffer-if-workers-stay-home-remote-labor-young-old-finance-college-11653664888> (accessed July 8, 2022) [https://perma.cc/SP92-QNYK]. See also *People v Heller*, 316 Mich App 314, 320 (2016) (" 'In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life . . . .' "), quoting *Stoner v Sowders*, 997 F2d 209, 213 (CA 6, 1993).

[4] See Haldar, *In and Out of Court: On Topographies of Law and the Architecture of Court Buildings*, 7 Int'l J for Semiotics L 185, 189 (1994) ("Architecture marks off and signifies that authority-to-judge which can only be found inside a court of law and nowhere else[;] it assigns legal discourse to a proper place.").

ccxv (2021) (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part). And that is undoubtedly one of the reasons that our taxpayers have provided every judge in our state with a courtroom—instead of a cubicle—to conduct court business.

The awe-inspiring nature of a visit to the courthouse is only enhanced by the presence of a black-robed judge peering out over the proceedings from a raised bench, in front of counsel's table and the public gallery, guarded by a uniformed bailiff, and surrounded by the flags, seals, and symbols of our state and nation. All of this is not just for theater: if we did not know it before, the pandemic has taught us that the physical courtroom, with all of its trappings, is essential to the decorum, gravity, and civility of the proceedings. Judge after judge has told us about the difficulties caused by widespread use of remote hearings, including "the judge's inability to control the proceedings, participants logging in while smoking, urinating or driving, difficulty communicating because of a bad internet connection and inability to assess whether court participants are under the influence of drugs or alcohol." *Opinion: People Deserve Their Post-Pandemic Day in Court*.[5] Multiple judges who spoke at the March 16, 2022 public hearing provided examples from their courtrooms and the courtrooms of their colleagues. See, e.g., Michigan Supreme Court, *Public Hearing: March 16, 2022*, pp 9, 12, 16, available at

[5] See also Wolfson, *Think a Court Cat Filter Is Weird? Try Virtual Court with Beer, Bikinis and Clients in Bed*, Louisville Courier Journal (December 18, 2020), available at <https://www.courier-journal.com/story/news/2020/12/18/amid-covid-19-pandemic-remote-court-hearings-bare-naked-truth/3932436001/> (accessed August 1, 2022) [https://perma.cc/X8GJ-F62G] (providing examples of parties and attorneys taking remote court appearances less seriously than warranted).

<https://www.courts.michigan.gov/4961dd/siteassets/rules-instructions-administrative-orders/transcripts-of-public-administrative-hearings/public-hearing-tr_03-16-2022.pdf> (accessed July 8, 2022) [https://perma.cc/SX4V-PKGU]. Examples of inappropriate behavior included an attorney representing a client while driving, an attorney appearing while walking and running, a defendant appearing while getting her hair dyed, a defendant smoking marijuana, and a defendant urinating, just to name a few. *Id*. at 12.

The lack of decorum and technical difficulties not only detract from the solemnity of the hearings, they make it more difficult for all of the participants to stay engaged and to focus on the important court business at hand. Even aside from the challenges noted above, as most of us know by now, it is always difficult to keep the participants of a virtual meeting engaged and paying attention. It boggles my mind that we would mandate that the majority of the trial court's business be conducted in this fashion. As Justice BERNSTEIN and I observed, "[w]hen a person comes before the court, a great deal is at stake: a person's liberty, a victim's safety, the support and care of a child, a person's employment or livelihood. Litigants deserve to have the full attention of the judge, court staff, attorneys and other parties when their case is being heard and decided." *Opinion: People Deserve Their Post-Pandemic Day in Court*.[6] The quality of judicial decision-making

[6] The majority's indifference to the value of in-person engagement is perhaps best exemplified by its insistence on allowing even the judge to work remotely! Under the majority's ill-considered new guidelines, judges are no longer required to preside over cases from their courtrooms. This rule, too, has been adopted without any public notice or discussion of whether judges should be authorized to rule on important matters from outside the courtroom. I believe that is a recipe for disaster.

and the public's satisfaction with the court system will inevitably decline with the overuse of virtual hearings.

The judge's inability to control the proceedings leads to other problems. Any rule mandating virtual court hearings in criminal cases was universally opposed by prosecutors and domestic violence prevention groups because it does not adequately protect the safety, privacy, and dignity of crime victims. The integrity of the proceedings is open to question because there is no way to know if parties, witnesses, or victims are being influenced by someone, or something that is occurring, behind the video camera.[7] Remote proceedings pose significant problems for criminal defendants too. The "preference" in the new rules for remote plea hearings will make it difficult for the trial court to ensure that the plea is understanding, voluntary, and accurate.[8] Court reporters are also experiencing great difficulty in preparing an accurate and reliable record of court proceedings. These problems likely explain why the vast majority of our state's trial judges who have given us input have vigorously opposed these changes.

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[7] This concern is not merely hypothetical. One proceeding in Michigan during which a defendant charged with domestic assault appeared via Zoom from the home of the alleged victim made national news. See Li, *Virtual Court Hearing Takes Turn After Prosecutor Spots Assault Suspect in Victim's Home*, NBC News (March 11, 2021), available at <https://www.nbcnews.com/news/us-news/virtual-court-hearing-takes-turn-after-prosecutor-spots-assault-suspect-n1260698> (accessed July 8, 2022) [https://perma.cc/5UDF-EMMQ].

[8] See DeRegis, *"Can You Hear Me Now?": The Implications of Virtual Proceedings on Criminal Defendants' Constitutional Rights*, 81 Md L R Online 71, 98 (2022) (arguing that "the use of virtual pleas should be subject to need, such as an emergency").

During the pandemic, much of American life—including work, worship, and education—was conducted remotely. The negative effects of this change are increasingly apparent. As Professor Edward Glaeser has recently observed, " 'The unmitigated disaster that remote learning has been for American children—and children throughout the world—has been confirmed in study after study, and particularly for the most disadvantaged kids.' " Varadarajan, *Can America's Cities Make a Post-Pandemic Comeback?*, Wall Street Journal (May 27, 2022), available at <https://www.wsj.com/articles/big-cities-will-suffer-if-workers-stay-home-remote-labor-young-old-finance-college-11653664888> (accessed July 8, 2022) [https://perma.cc/SP92-QNYK].

Professor Glaeser also mentioned the deleterious effects Zoom instruction has had on his college lectures: " 'None of the magic that comes from live lecturing and live interaction with students is there when you're doing it via Zoom.' " *Id*. As chair of the Economics Department at Harvard, he recently heralded the return to in-person instruction, stating that "[i]deas have long sparkled along the hallways and in the seminar rooms of [the Littauer Center], and I am so happy that we will be returning physically to our building after August 2. Zoom, for all of its marvels, is no substitute for face-to-face interaction." Edward Glaeser, *Message from the Chair*, Harvard University Dep't of Economics, available at <https://economics.harvard.edu/message-chair> (accessed July 8, 2022) [https://perma.cc/54ML-NZJ6]. Other leading lights in the American business com-

munity are following suit, noting the disadvantages of virtual work.[9] Empirical research bears out these concerns.[10]

Until recently, this wisdom was not lost on courts. In *People v Heller*, 316 Mich App 314 (2016), addressing

[9] For example, Elon Musk recently announced that all of his employees at Tesla and SpaceX will be required to work in-person for a minimum of 40 hours per week, including senior executives. In his view, being physically present at work was essential to producing new and meaningful products. Kost, *Elon Musk to Tesla, SpaceX Employees: 40 Hours in the Office or Find Another Job*, San Francisco Chronicle, (June 1, 2022) available at <https://www.sfchronicle.com/tech/article/Elon-Musk-to-Tesla-SpaceX-employees-40-hours-in-17212688.php> (accessed July 8, 2022) [https://perma.cc/JC57-UFJL]. See also Lyons, *Apple CEO Tim Cook Tells Employees the Return to Offices Will Begin on April 11th*, The Verge (March 4, 2022) (quoting Tim Cook as extolling the "irreplaceable benefits of in-person collaboration"), available at <https://www.theverge.com/2022/3/4/22961592/apple-april-11-return-office-corporate-pandemic-tim-cook> (accessed July 8, 2022) [https://perma.cc/NU6J-3VLD]; Cutter, *What CEOs Really Think About Remote Work* (September 23, 2020), Wall Street Journal (noting numerous comments by CEOs, including Reed Hastings of Netflix, who stated, " 'I don't see any positives [to remote work]. Not being able to get together in person, particularly internationally, is a pure negative,' " and James Dimon of JP Morgan Chase & Co, who stated, " 'I think going back to work is a good thing. I think there are negatives to working from home . . . . We've seen productivity drop in certain jobs and alienation go up in certain things.' "), available at <https://www.wsj.com/articles/what-ceos-really-think-about-remote-work-11600853405> (accessed July 8, 2022) [https://perma.cc/3V6Z-LJAW].

[10] See, e.g., Yang et al, *The Effects of Remote Work on Collaboration Among Information Workers*, 6 Nature Human Behavior 43, 43, 49-50 (2022) (finding that firm-wide remote work "caused the collaboration network of workers to become more static and siloed, with fewer bridges between disparate parts" and disrupted communications, "mak[ing] it harder for employees to acquire and share new information across the network," making it more difficult to process complex information, and potentially decreasing the quality of workers' output); Karl et al, *Virtual Work Meetings During the COVID-19 Pandemic: The Good, Bad, and Ugly*, 53 Small Group Research 343, 345-346 (2021) (noting research that shows exhaustion from videoconferencing, lower motivation to perform behaviorally and cognitively, and more disruptive multitasking).

whether felony sentencing should occur in person, our Court of Appeals touched on many of these same themes. After noting that "[s]entencing 'is an intensely human process,' " the Court observed as follows:

> Undoubtedly, two-way interactive video technology saves courts money and time, and it dramatically lessens security concerns. But in the felony sentencing context, it is simply inconsistent with the intensely personal nature of the process. After all, "[s]entencing is the point where the heart of the law—and its human face—is most clearly revealed." Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 Cardozo L Rev 1, 179 (2008). Sentencing by video dehumanizes the defendant who participates from a jail location, unable to privately communicate with his or her counsel and likely unable to visualize all the participants in the courtroom. Moreover, a courtroom "is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers[.]" *Estes v Texas*, 381 US 532, 561; 85 S Ct 1628; 14 L Ed 2d 543 (1965) (Warren, C.J., concurring). The courtroom setting provides "a dignity essential" to the process of criminal adjudication. *Id*. Isolating a defendant from that setting during what may be the most decisive moment of his or her life clashes with the judge's duty to acknowledge the humanity of even a convicted felon.
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> Canadian philosopher Marshall McLuhan's famous quote, "the medium is the message," bears relevance to this discussion. In McLuhan's words:
>
> > [I]t is the medium that shapes and controls the scale and form of human association and action. The content or uses of such media are as diverse as they are ineffectual in shaping the form of human association. Indeed, it is only too typical that the "content" of any medium blinds us to the character of the medium. [McLuhan, *Understanding Media: The Extensions of Man* (Cambridge: MIT Press, 1994), p 9.].

> The medium itself—here, videoconferencing from a jail—delivers content of its own. That content, in turn, influences the perceptions of the participants. Abundant social science research demonstrates that video conferencing "as a mediating technology" may color a viewer's assessment of a person's credibility, sincerity, and emotional depth. Salyzyn, *A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario*, 50 Osgoode Hall L J 429, 445 (2012). Some studies suggest that "individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators." *Id*. at 447. Courts, too, have recognized that "virtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *United States v Lawrence*, 248 F3d 300, 304 (CA 4, 2001). . . .
>
> Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of "the true moral fiber of another," *Del Piano v United States*, 575 F2d 1066, 1069 (CA 3, 1978), a task made far more complex when the defendant speaks through a microphone from a remote location. The trial judge who sentenced Heller never met or sat in the same room with him. In our view, Heller's absence from the sentencing nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair. [*Heller*, 316 Mich App at 319-321 (citation omitted; alterations in original).]

The widespread opposition to the overuse of virtual court hearings is rooted in the commonsense realization that the quality of human interaction improves when it is in person. A bare majority of our Court rejects this wisdom and ignores the many benefits of face-to-face interaction that have defined courtroom practice and ordinary life experience for centuries. I fear that, like remote schooling, remote court will have a devastating impact on the quality of court services,

particularly for low-income litigants.[11] Instead of lemonade, the majority's order will only leave lemons for all of those interested in a well-functioning court system. Compare Rescission of Pandemic-Related Administrative Orders, 507 Mich cxcvii, ccix (2021) (MCCORMACK, C.J., concurring) (arguing that the benefits of remote proceedings are "lemonade").

B. THE COURT'S DECISION TO MAKE THESE MAJOR CHANGES WITHOUT RECEIVING INPUT ABOUT THEM SHOWS A LACK OF CONCERN FOR THE FUNCTIONING OF OUR TRIAL COURTS AND A LACK OF RESPECT FOR OUR TRIAL JUDGES AND OTHER STAKEHOLDERS

Like our recent decision to create a new court holiday with little advance notice, Amendment of Rule 8.110 of the Michigan Court Rules, 509 Mich cxxiii (June 1, 2022), the Court's administrative decision-making continues to show little concern for the impact of our decisions on the day-to-day functioning of our trial courts. As noted, we addressed the general subject of remote proceedings at our March 16, 2022 public hearing. The comments we received demonstrated that remote proceedings were controversial and were resisted by many of our stakeholders—including the

[11] According to one survey, 70% of Detroit's school-age children have no Internet access at their home. Urban Collaboratory, *Mapping Detroit's Digital Divide*, University of Michigan, available at <https://www.urbanlab.umich.edu/project/mapping-detroits-digital-divide> (accessed July 8, 2022) [https://perma.cc/J9VM-XCVH].

overwhelming majority of trial judges who have given us input.[12] This alone should give us pause.[13]

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[12] Chief Justice MCCORMACK erroneously attributes to me a "suggestion that trial judges largely oppose remote proceedings." I have made no such suggestion. Rather, I have made the uncontroverted observation that our trial judges largely oppose a broad expansion of mandated remote proceedings. It is unsurprising that most of the district judges surveyed indicated that they intend to use remote proceedings going forward even if not mandated—after all, Michigan courts have conducted arraignments via video since at least 1990. See Administrative Order No. 1990-1, 434 Mich ciii (1990). Video arraignments were expressly authorized by the Legislature in 1994, see MCL 767.37a, and in the early 2010s the state started working toward adopting Polycom technology statewide for arraignments to eliminate the need to transport inmates to courthouses. Jones, *Michigan Expands Video Conferencing in Prisons*, Government Technology (December 20, 2010) <https://www.govtech.com/public-safety/michigan-expands-video-conferencing-in-prisons.html> (accessed August 1, 2022). No one is proposing the complete elimination of remote proceedings in courts across Michigan, so general questions about continued use of remote technology largely miss the point. The relevant inquiry is what types of proceedings, if any, should be held remotely that are currently being held in person. Significantly, in the survey of district court judges, the types of proceedings that most judges felt should be always or mostly remote was quite limited. See Michigan District Judges Association, *Online Survey of Judges with District Court Dockets: Executive Summary and Demographic Analysis* (October 2021), p 16, available at <https://www.courts.michigan.gov/4a236c/contentassets/e636e8ac7b40411d98206f933c7b8257/approved/2020-08_2022-07-29_mdjasurveyreport.pdf> (accessed August 1, 2022) [https://perma.cc/MN4H-D8YH]. Chief Justice MCCORMACK fails to acknowledge that judges who wish to conduct certain proceedings remotely already possessed the ability to do so under the court rules as they existed prior to the COVID-19 pandemic.

[13] Chief Justice MCCORMACK cites the survey conducted by the State Bar of Michigan referenced in the Lessons Learned report as evidence of the "inclusive development process" of these court rule amendments and contends that the vast majority of respondents who submitted feedback during the process supported the continued use of remote proceedings. But the devil is in the details. Eighty-two percent of respondents to this survey indicated that they "want the trial courts to continue to provide remote hearings as a part of routine trial court operations[.]" SurveyMonkey, *Member Needs and Concerns Regarding Practice During*

But the majority is undeterred and, instead of heeding the thoughtful input of our experienced frontline workers, prosecutors, domestic-violence prevention groups, and many others, the Court has developed an elaborate new set of amendments. This time, there is no opportunity for the public and other stakeholders to see the new amendments and voice their concerns. Not only has the Court not requested comment in advance of adopting the rules, the Court does not even concurrently publish these rules for comment (as it did the last time) or provide any reason for dispensing with the notice requirements of our court rules. See MCR 1.201(D). I am aware of no precedent for the Court's stunning decision to violate our own rules by making wholesale changes to the way our trial courts operate on a daily basis without providing any opportunity for input from the public, the legal community, or other stakeholders. See MCR 1.201(E).[14]

Covid-19 <https://www.surveymonkey.com/results/SM-J2R39NFG7/> (accessed August 1, 2022). But when asked "which types of cases or hearings are best suited for remote hearings," out of fourteen possible categories, only "non-evidentiary hearings/motions" was selected by a majority of all survey respondents (including those who declined to respond to this question). *Id*. That is hardly full-throated support for greatly expanded remote proceedings.

[14] Chief Justice MCCORMACK points out a number of occasions on which the Court has adopted court rule revisions different than those published for comment. I do not disagree that the Court can make modest improvements to a proposal based on comments the Court receives. Indeed, fine-tuning a change to the court rules based on public comment is one of the key benefits of the notice and comment requirements. But unlike the examples given by Chief Justice MCCORMACK, no version of the amendments adopted today has ever been published for comment. Indeed, the new rules are so significant and so vastly different from those previously published for comment that it is at best misleading to suggest that the public or our many stakeholders have ever even seen them, much less been given an opportunity to comment on them.

Major changes—even good ones—are often very disruptive. That is why our rules require us to publish rule changes for comment, consider the input we receive, and then deliberate and decide whether to adopt the changes. The Prosecuting Attorneys Association of Michigan stated in their November 1, 2021 comment (asking the Court to rescind the last round of unannounced changes):

> Making changes of this magnitude without allowing for public comment is unacceptable. The changes show a complete disregard for crime victims and their constitutional and statutory rights. Had the standard procedure for changing a court rule been followed, these concerns would have been brought to the Court's attention prior to any amendments. [Prosecuting Attorneys Association of Michigan, Letter (Nov 1, 2021).]

Before making major changes to the way our state's trial courts function, the majority should have published the proposed rules, setting forth the specific changes that are now being enacted to ensure that we receive adequate input from all stakeholders, including judges, court staff, court reporters, law enforcement, attorneys, public interest groups, and members of the public. It is especially important to follow our regular process here because the proposal currently before the Court is completely different than the one adopted with immediate effect and published for comment in July 2021.[15]

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[15] In contrast to our haste, other states are proceeding with more thoughtfulness and deliberation. Most states have not permanently expanded the use of remote proceedings in the wake of the COVID-19 pandemic. Indeed, many states have not made permanent changes at all or are still in the process of determining whether and what changes should be made. For example, the Florida Supreme Court is currently considering a proposal that would expand the proceedings in which remote technology is permitted. *In re Amendments to Florida Rules of*

Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, and Florida Rules of Appellate Procedure (Case No. SC21-990). Some states, such as Illinois, are just now beginning the process of considering whether—and to what extent—to amend their remote proceeding procedures. Niemann, *Illinois Supreme Court Creates Remote Proceedings Task Force*, Illinois State Bar Association (March 17, 2022), available at <https://www.isba.org/barnews/2022/03/illinoissupremecourtcreatesremotepr> (accessed July 8, 2022) [https://perma.cc/E5H4-VXZZ]. The Supreme Court of New Jersey has required that certain matters generally "proceed in a virtual format," but the court made its order "subject to ongoing review," and New Jersey has not made permanent changes to its court rules regarding remote proceedings. See Supreme Court of New Jersey, *Future of Court Operations—Continuation of Both In-Person and Virtual Court Events* (November 18, 2021), available at <https://www.njcourts.gov/notices/2021/n211118a.pdf?c=A4s> (accessed August 1, 2022) [https://perma.cc/8NAW-S4QQ].

Among the few states that have made permanent changes, I am aware of no state that has made changes as significant as those the majority makes today. In March 2022, the Maryland Judicial Council adopted a recommendation to treat certain types of proceedings "as presumptively appropriate for remote proceedings under normal operating conditions," but it did not make any changes to its court rules. Maryland Judiciary, *Report of Joint Subcommittee on Post-COVID Judicial Operations* (March 9, 2022), p 20, available at <https://online.flippingbook.com/view/545032313/> (accessed August 1, 2022) [https://perma.cc/TEC5-PNG3]; Maryland Courts, *Maryland Judiciary Adopts Recommendations and Releases Report from Joint Subcommittee on Post COVID-19 Judicial Operations* (March 31, 2022), available at <https://www.courts.state.md.us/media/news/2022/pr20220331> (accessed August 1, 2022) [https://perma.cc/5QHT-RWHT]. In April 2022, the Arizona Supreme Court adopted a recommendation from its remote proceedings workgroup that local courts decide which types of hearings should be heard remotely, allowing individual courts to adapt a set of presumptive standards as necessary. COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup, *Recommended Remote and In-Person Hearings in Arizona State Courts in the Post-Pandemic World* (February 22, 2022), Arizona Supreme Court, available at <https://www.ncsc.org/__data/assets/pdf_file/0029/75809/Recommended-Remote-and-In-Person-Hearings-in-Arizona-State-Courts-in-the-Post-Pandemic-World-2222022-FINAL.pdf> (accessed July 8, 2022)

Each of our trial courts is locally funded and has different resources (and, consequently, different limitations) when it comes to staffing, training, and technology. To conduct their business, the trial courts must work with many other state and local agencies, such as local police departments, county sheriff's departments, and the Michigan Department of Corrections. Each of these has its own resource limitations and many are subject to collective bargaining agreements. In addition, litigants have their own resource limitations and, as noted above, Internet connectivity varies in different regions of the state. Our courts across the state face vastly different challenges, depending on their size, population served, caseloads, and many other factors. Imposing these very specific changes on a statewide basis without giving individual trial courts a chance to comment on how they will impact their current workflows risks causing major disruptions to the administration of justice in our trial courts at a time when many are already experiencing massive case backlogs.[16]

Although I have mentioned the topic frequently, the caseflow problems in many of our trial courts appear to

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[https://perma.cc/AQ7W-FCDM]; *In re Adoption and Implementation of Plan B Workgroup Recommendations as Presumptive Standards for Remote and In-Person Hearings*, Arizona Supreme Court, Administrative Order No. 2022-46 (2022). Finally, effective June 2022, Minnesota adopted a presumption for remote hearings, but the presumption does not apply to criminal cases. Minnesota Judicial Council, *oneCourtMN Hearings Initiative Policy*, available at <https://www.mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/525.pdf> (accessed July 8, 2022) [https://perma.cc/EM7D-D4PB].

[16] Brand-Williams, *Michigan Courts Face Massive Backlog of Felony Cases Awaiting Trial*, The Detroit News (July 4, 2021) <https://www.detroitnews.com/story/news/local/michigan/2021/07/04/michigan-courts-face-massive-backlog-felony-cases-awaiting-trial/7787034002/> (accessed July 20, 2021) [https://perma.cc/P8PB-UXE3].

have received scant attention from this Court despite the dramatically negative impact it is having on public safety across our state. The backlog consists of criminal and civil cases that require in-person hearings, such as jury trials and preliminary examinations. The Court's insistence on requiring even more remote hearings, which studies have shown take longer to conduct on average than in-person hearings, will not alleviate the docket crisis in our courts.[17] Indeed, many commenters at our March 2022 public hearing described how expanding the use of remote hearings has increased the time, expense, and difficulty of their work.

After our judges, court staff, and attorneys have made significant sacrifices to keep our court system up and running through the pandemic, the least we could do is ask them how these major changes would affect court operations before implementing them.

III. CONCLUSION

I have long supported and advocated for the use of new and innovative technologies when it improves the administration of justice. And I have always supported giving our trial judges the discretion to use videoconferencing for a wide variety of matters. Thus, I agree with some of the amendments the Court adopts today. But I strongly believe our trial judges are best positioned to decide whether to conduct hearings remotely on individual cases. Rather than create a statewide

[17] For example, a study in Texas trial courts found that, on average, remote hearings take about one-third longer than in-person hearings. National Center for State Courts, *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload*, pp ii, 5-7, available at <https://www.ncsc.org/_media/_imported-ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assesment-Report.pdf> (accessed July 8, 2022) [https://perma.cc/3YZL-GFFL].

presumption that certain proceedings be held remotely, I would return to the status quo ante, which allowed wide latitude for judges to conduct any proceeding remotely upon the request of a party or sua sponte within the discretion of the court. In addition, I would give our trial courts the flexibility to determine whether remote proceedings should be required for certain types of proceedings in their jurisdiction. Today's decision to take this traditional discretion away from trial judges and impose a one-size-fits-all rule is a profound mistake.

As noted, during the COVID-19 pandemic, we gave trial courts the authority to conduct many additional types of hearings remotely. I initially supported these efforts as necessary to allow our courts to continue to function. Now I see that was a mistake. What initially appeared to be a temporary expedient has become, for a majority of this Court, a pretext to make virtual courts the new normal in our state. Forcing massive changes on a bare majority vote through such an irregular process is an affront to justice that will only sow more confusion, frustration, delays, and distrust in the court system.

I fear and believe that the Court's decision today to deprive people of their day in court will usher in a new period of mediocrity, continued case backlogs, and subpar service in our court system. I have no choice but to dissent.

BERNSTEIN, J. (*dissenting*). A majority of this Court has decided to permanently adopt amendments to our court rules that were first put into place during the onset of the COVID-19 pandemic. Although I believe these amendments made sense in the context in which they were first adopted, I have continuously expressed concerns about expanding these amendments beyond

that specific scope. See Rescission of Pandemic-Related Administrative Orders, 507 Mich cxcvii, ccxiii-ccxix (2021) (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part); Bernstein & Viviano, *Opinion: People Deserve Their Post-Pandemic Day in Court*, The Detroit News (March 29, 2022), available at <https://www.detroitnews.com/story/opinion/2022/03/30/michigan-courts-should-dispense-justice-person-post-covid/7203119001> (accessed July 21, 2022) [https://perma.cc/7TUS-5DVB]. While I recognize that videoconferencing technology can be useful for some, especially in terms of physical accessibility, it can also present *additional* barriers to access for others, such as those who simply lack the resources to use videoconferencing technology. I also have security concerns about whether the use of this technology, especially when an individual is detained in a county jail or a state correctional facility, can be used to facilitate truly confidential exchanges between an attorney and their client. Moreover, when we held public comments concerning these proposed amendments, the near-universal feedback from trial court judges was that videoconferencing was disruptive and produced worse outcomes. It is notable that members of the criminal bar specifically levied meaningful criticism against the expanded use of these practices.

I acknowledge that the amendments this Court has adopted allow for the possibility of in-person hearings, but the language of these amendments makes clear that a thumb has been put on the scale, and the default preference going forward is for videoconference hearings. I fear that we have not fully considered the implications of these new amendments and what they may mean for some of the most vulnerable members of our community.

I would not adopt these amendments under the timeframe we have been given to consider them, bearing in mind the negative feedback we've received from important stakeholders. Accordingly, I dissent.

Adopted September 14, 2022, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, this is to advise that the amendment of Rule 1.109 of the Michigan Court Rules is adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendment during the usual comment period. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109 COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(c) [Unchanged.]

(d) Converting Paper Documents. The clerk of the court shall convert to electronic format certain~~any~~ documents filed on paper in accordance with the electronic filing implementation plans established by the State Court Administrative Office.

(e)-(l) [Unchanged.]

(4)-(7) [Unchanged.]

(H) [Unchanged.]

Staff comment (ADM File No. 2002-37): The amendment of MCR 1.109 provides SCAO the flexibility to determine, when appropriate, when certain documents filed on paper do not need to be imported into the MiFILE document management system until bulk e-filing capability is available.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Adopted September 21, 2022, effective immediately (File No. 2002-37)—REPORTER.

On order of the Court, notice and opportunity for comment having been provided, the April 13, 2022 amendment of Rule 1.109 of the Michigan Court Rules is retained.

Adopted September 21, 2022, effective January 1, 2023 (File No. 2020-33)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.903 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.903 DEFINITIONS

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(18) [Unchanged.]

(19) "Party" includes ~~the~~

(a) ~~petitioner and juvenile~~ in a delinquency proceeding,~~:~~

(i) the petitioner and juvenile.

(b) ~~petitioner, child, respondent, and parent, guardian, or legal custodian~~ in a protective proceeding,~~:~~

(i) the petitioner, child, and respondent

(ii) the parent, guardian, or legal custodian.

(20)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

Staff Comment (ADM File No. 2020-33): The amendment of MCR 3.903 clarifies the definition of a "party" in child protective proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 21, 2022, effective January 1, 2023 (File No. 2021-13)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 8.119 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 8.119 COURT RECORDS AND REPORTS; DUTIES OF CLERKS

(A)-(B) [Unchanged.]

(C) Filing of Documents and Other Materials. The clerk of the court shall process and maintain documents filed with the court as prescribed by Michigan Court Rules and the Michigan Trial Court Records Management Standards and all filed documents must be file stamped in accordance with these standards. The clerk of the court may only reject documents submitted for filing that do not comply with MCR 1.109(D)(1) and (2), are not signed in accordance with MCR 1.109(E), or are not accompanied by a required filing fee or a request for fee waiver under MCR 2.002(B), unless already waived or suspended by court order. Documents prepared or issued by the court for placement in the case file are not subject to rejection by the clerk of the court and shall not be stamped filed but shall be recorded in the case history as required in subrule (D)(1)(a) and placed in the case file.

(D)-(L) [Unchanged.]

Staff Comment (ADM File No. 2021-13): The amendment of MCR 8.119 clarifies that a request for a fee waiver must be filed in accordance with MCR 2.002(B), which requires the request to be made on a form approved by the State Court Administrative Office.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 21, 2022, effective January 1, 2023 (File No. 2021-16)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.305 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.305 APPLICATION FOR LEAVE TO APPEAL

(A)-(B) [Unchanged.]

(C) When to File.

(1) [Unchanged.]

(2) Application After Court of Appeals Decision. Except as provided in subrule (C)(4), the application must be filed within ~~28 days in termination of parental rights cases, within~~ 42 days in ~~other~~ civil cases, or within 56 days in criminal cases, after:

(a)-(d) [Unchanged.]

(3)-(7) [Unchanged.]

(D)-(I) [Unchanged.]

Staff Comment (ADM File No. 2021-16): The amendment of MCR 7.305 increases the 28-day timeframe for filing an application for leave to appeal in cases where parental rights have been terminated.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 21, 2022, effective January 1, 2023 (File No 2021-17)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Administrative Order No. 1998-1 is rescinded and the amendment of MCR 2.227 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.227 TRANSFER OF ACTIONS ON FINDING OF LACK OF JURISDICTION

(A) Transfer to Court Which Has Jurisdiction. Except as otherwise provided in this rule, w~~W~~hen the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue.

(B) Transfers From Circuit Court to District Court.

(1) A circuit court may not transfer an action to district court under this rule based on the amount in controversy unless:

(a) the parties stipulate in good faith to the transfer and to an amount in controversy not greater than the applicable jurisdictional limit of the district court; or

(b) from the allegations of the complaint, it appears to a legal certainty that the amount in controversy is not greater than the applicable jurisdictional limit of the district court.

(B)-(C) [Relettered (C)-(D) but otherwise unchanged.]

(ED) Procedure After Transfer.

(1) The action proceeds in the receiving court as if it had been originally filed there. If further pleadings are required or allowed, the time for filing them runs from the date the filing fee is paid under subrule (DC)(1). The receiving court may order the filing of new or amended pleadings. If part of the action remains pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.

(2) [Unchanged.]

(3) A waiver of jury trial in the court in which the action was originally filed is ineffective after transfer. A party who had waived trial by jury may demand a jury trial after transfer by filing a demand and paying the applicable jury fee within 28 days after the filing fee is paid under subrule (DC)(1). A demand for a jury trial in the court in which the action was originally filed is preserved after transfer.

(E) [Relettered (F) but otherwise unchanged.]

Staff Comment (ADM File No. 2021-17): The rescission of Administrative Order No. 1998-1 and amendment of MCR 2.227 moves the relevant portion of the administrative order into court rule format and makes the rule consistent with the holding in *Krolczyk v Hyundai Motor America*, 507 Mich 966 (2021).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 21, 2022, effective January 1, 2023 (File No 2021-18)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.943 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.943 DISPOSITIONAL HEARING

(A)-(D) [Unchanged.]

(E) Dispositions.

(1)-(6) [Unchanged.]

(7) Mandatory Detention for Use of a Firearm.

(a)-(b) [Unchanged.]

(c) "Firearm" includes any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive~~means any weapon from which a dangerous projectile may be propelled by using explosives, gas, or air as a means of propulsion, except any smoothbore rifle or hand gun designed and~~

~~manufactured exclusively for propelling BB's not exceeding.177 caliber by means of spring, gas, or air~~.

Staff Comment (ADM File No. 2021-18): The amendment of MCR 3.943 updates the definition of "firearm" in juvenile proceedings to be consistent with MCL 8.3t, which contains the definition referenced in the court rule's companion statute, MCL 712A.18g.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted September 21, 2022, effective immediately (File No 2021-40)—REPORTER.

On order of the Court, notice and an opportunity for comment having been provided, the March 16, 2022 amendment of Rule 5 of the Rules for the Board of Law Examiners is retained.

Adopted October 26, 2022, effective January 1, 2023 (File No. 2022-06)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.101 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.101 GARNISHMENT AFTER JUDGMENT

(A)-(E) [Unchanged.]

(F) Service of Writ.

(1) The plaintiff shall serve the writ of garnishment, a copy of the writ for the defendant, the disclosure

form, and any applicable fees, on the garnishee within 182 days after the date the writ was issued in the manner provided for the service of a summons and complaint in MCR 2.105, except that service upon the state treasurer may be made in the manner provided under subrule (3).

(2) [Unchanged.]

(3) Unless service is subject to electronic filing under MCR 1.109(G), service upon the state treasurer or any designated employee may be completed electronically in a manner provided under guidelines established by the state treasurer. Guidelines established under this subsection shall be published on the department of treasury's website and shall identify, at a minimum, each acceptable method of electronic service, the requirements necessary to complete service, and the address or location for each acceptable method of service. For purposes of this subsection:

(i) Electronic service authorized under the guidelines shall include magnetic media, e-mail, and any other method permitted at the discretion of the state treasurer.

(ii) Service in the manner provided under this subsection shall be treated as completed as of the date and time submitted by the plaintiff, except that any submission made on a Saturday, Sunday, or legal holiday shall be deemed to be served on the next business day.

(G)-(T) [Unchanged.]

Staff Comment (ADM File No. 2022-06): The amendment of MCR 3.101 allows writs of garnishment to be served electronically on the Department of Treasury, subject to current e-filing requirements and guidelines established by the Department of Treasury.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted November 2, 2022, effective January 1, 2023 (File No 2020-13)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.005 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.005 RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities.

(1) The responsibilities of the trial lawyer who represents the defendant include

(a~~1~~) representing the defendant in all trial court proceedings through initial sentencing,

(b~~2~~) filing of interlocutory appeals the lawyer deems appropriate, and

(c~~3~~) responding to any preconviction appeals by the prosecutor. Unless an appellate lawyer has been appointed or retained, t~~T~~he defendant's trial lawyer must either:

(i) file a ~~substantive brief in~~ response to any~~the prosecutor's interlocutory~~ application for leave to appeal, appellant's brief, or substantive motion; or

(ii) notify the Court of Appeals in writing that the defendant has knowingly elected not to file a response~~that the lawyer will not be filing a brief in response to the application~~.

(2~~4~~) [Renumbered but otherwise unchanged.]

(3~~5~~) W~~w~~hen an appellate lawyer has been appointed or retained, the trial lawyer is responsible for promptly making the defendant's file, including all discovery material obtained and exhibits in the trial lawyer's possession, reasonably available ~~for copying~~ upon request of the appellate~~that~~ lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) [Unchanged.]

Staff comment (ADM File No. 2020-13): The amendment of MCR 6.005 clarifies the duties of attorneys in preconviction appeals.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

WELCH, J. (*concurring*). I fully support the Court's efforts to clarify a criminal defense trial attorney's responsibilities regarding preconviction appeals. The importance of representation for defendants at the early stage of criminal proceedings cannot be understated. However, many of the concerns that I previously raised when this rule was published for comment remain. See Proposed Amendment of MCR 6.005, 507 Mich 1234, 1235-1236 (2021) (WELCH, J., concurring). Under the amended rule, unless separate appellate counsel has been retained or appointed, a trial attorney is required to respond to any preconviction appeal filings submit-

ted by a prosecutor, MCR 6.005(H)(1)(c)(i), or "notify the Court of Appeals in writing that defendant has knowingly elected not to file a response," MCR 6.005(H)(1)(c)(ii). These options are likely sufficient in most circumstances. But what if no competent appellate attorney is willing to take the case and the trial attorney does not believe they are sufficiently competent in appellate practice or believes that their busy trial schedule will make it unreasonably difficult to provide effective representation in the Court of Appeals? In such circumstances, MRPC 1.1 might require the attorney to consider asking to withdraw as counsel for the accused. Courts generally have broad discretion to decide whether to allow counsel to withdraw. See, e.g., *People v Williams*, 386 Mich 565 (1972); *People v Echavarria*, 233 Mich App 356 (1999). If the trial court grants a request to withdraw, then the attorney's ethical conundrum is solved, but the accused will need a new attorney. If the trial court denies a request to withdraw, then that could increase the likelihood of ineffective-assistance-of-counsel concerns before the Court of Appeals. Additionally, if a client is unable or unwilling to pay any additional fee that a retained trial attorney charges for a preconviction appeal, is the retained attorney now required to work for free? If so, what effect would that have on the attorney-client relationship? While attorney ethics rules have been modified to allow for unbundled representation in civil litigation, similar modifications have not been made in the criminal context. Thus, I question whether criminal defense trial attorneys can solve the challenges I have raised by entering into limited-scope representation agreements with their clients. See MCR 6.005(H)(1) (scope of trial lawyer's responsibilities); MCR 2.117 (effect of appearance by attorney in an action); MRPC 1.1 (duty to provide competent repre-

sentation); and MRPC 1.2 (scope of representation). Although in most cases a transition to or partnership with appellate counsel will likely occur, it also seems predictable that there will be situations where one of the scenarios I have outlined could arise. My concerns cause me to believe that we should state explicitly in this rule that trial attorneys are permitted to withdraw if they reasonably believe that they are unable to represent the accused competently and ethically before the Court of Appeals. In summary, while the adopted amendments are an important improvement, I remain concerned that lingering ambiguity in the court rule will lead to situations that we may be required to address in the future.

Adopted November 16, 2022, effective immediately (File Nos 2002-37 and 2017-28)—REPORTER.

By order dated May 11, 2022, the Court adopted amendments of Rules 1.109 and 8.119 of the Michigan Court Rules. Notice and an opportunity for public comment having been provided, effective immediately, the amendments of Rules 1.109 and 8.119 are retained, with further amendment of Rule 1.109 appearing in underlining and/or strikethrough below.

> [Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109 COURT RECORDS DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1)-(8) [Unchanged.]

(9) Personal Identifying Information.

(a) [Unchanged.]

(b) Filing, Accessing, and Serving Personal Identifying Information.

(i)-(ii) [Unchanged.]

(iii) Except as otherwise provided by these rules, if a party is required to include protected personal identifying information in a public document filed with the court, the party shall file the document with the protected personal identifying information redacted, along with a personal identifying information form approved by the State Court Administrative Office under subrule (i). The personal identifying information form must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers listed in the personal identifying information form will be understood to refer to the corresponding complete identifier. A party may amend the personal identifying information form as of right. Fields for protected personal identifying information may be included in SCAO-approved court forms, and the information will be protected in the form and manner established by the State Court Administrative Office.

Unredacted protected personal identifying information may be included on Uniform Law Citations filed with the court and on proposed orders submitted~~presented~~ to the court. If a party submits to the court a proposed order that is required to contain unredacted protected personal identifying information once issued by the court, the party shall not attach the proposed order to another document.

(iv)-(vii) [Unchanged.]

(c)-(e) [Unchanged.]

(10) [Unchanged.]

(E)-(H) [Unchanged.]

Staff comment (ADM File Nos. 2002-37 and 2017-28): The amendments of MCR 1.109 and MCR 8.119 aid in protecting personal identifying information included in citations, proposed orders, and public documents filed with or submitted to the court before April 1, 2022, the effective date of the Court's orders amending rules regarding personal identifying information.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted November 16, 2022, effective January 1, 2023 (File No. 2021-39)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.215 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.215 OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS

(A)-(E) [Unchanged.]

(F) Execution and Enforcement.

(1)-(2) [Unchanged.]

(3) Reissuance of Judgment or Order. Any party may request that an opinion or order be reissued with a new entry date by filing a letter with the Court of Appeals setting forth facts showing that the clerk or attorney failed to send the judgment or order as

provided in subrule (E)(2). The Court of Appeals will not reissue the opinion or order unless persuaded that it was not promptly sent as required and that the failure resulted in the party being precluded from timely filing a motion for reconsideration or an application for leave to appeal with the Supreme Court. Such request will be submitted to the Chief Judge for administrative decision, and the decision will be communicated by letter from the clerk.

(G)-(J) [Unchanged.]

Staff Comment (ADM File No. 2021-39): The amendment of MCR 7.215 codifies the Court of Appeals' practice for reissuing opinions and orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted November 16, 2022, effective January 1, 2023 (File No. 2021-48)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.502 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.502 MOTION FOR RELIEF FROM JUDGMENT

(A)-(F) [Unchanged.]

(G) Successive Motions.

(1) [Unchanged.]

(2) A defendant may file a second or subsequent motion based on any of the following:

(a) a retroactive change in law that occurred after the first motion for relief from judgment was filed,

(b) ~~or~~ a claim of new evidence that was not discovered before the first such motion was filed, or~~:~~

(c) a final court order vacating one or more of the defendant's convictions either described in the judgment from which the defendant is seeking relief or upon which the judgment was based.

The clerk shall refer a successive motion to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime. For motions filed under both (G)(1) and (G)(2), the court shall enter an appropriate order disposing of the motion.

(3) [Unchanged.]

Staff Comment (ADM File No. 2021-48): The amendment of MCR 6.502 codifies a third exception to the "one and only one motion" rule based on a final court order vacating one or more of a defendant's convictions either described in the judgment or upon which the judgment was based.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted November 16, 2022, effective January 1, 2023 (File No. 2022-09)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the

comments received, the following amendment of Rule 3.703 of the Michigan Court Rules is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.703 COMMENCING A PERSONAL PROTECTION ACTION

(A) Filing. A personal protection action is an independent action commenced by filing a petition with a court. Where e-filing is implemented, a partially-completed personal protection order must be prepared on a form approved by the State Court Administrative Office and submitted at the same time as the petition. The petitioner, or an individual who is assisting the petitioner under MCL 600.2950b(4), shall complete in the form only the case caption and the known fields with identifying information, including protected personal identifying information of the respondent; however, at a minimum the race, sex, and date of birth or age of the respondent must be provided for LEIN entry. The personal identifying information form required by MCR 1.109(D)(9)(b)(iii) shall not be filed under this rule. There are no fees for filing a personal protection action, and no summons is issued. A personal protection action may not be commenced by filing a motion in an existing case or by joining a claim to an action.

(B)-(G) [Unchanged.]

Staff comment (ADM File No. 2022-09): The amendment of MCR 3.703 is necessary for design and implementation of the statewide electronic-filing system. This amendment provides the court with necessary protected personal identifying information in an appropriate format and reduces workload preparing personal protection orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

Adopted December 07, 2022, effective immediately (File No. 2022-18)—REPORTER.

On order of the Court, the following amendment and additions of Internal Operating Procedures for the Judicial Tenure Commission are adopted, effective immediately.[*]

[IOPs 9.202(G)-6, 9.207(B)-14, and 9.207(B)-15 are new and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

IOP 9.202(G)-6

Complaints about Commission Staff. The Commission occasionally receives complaints about staff or the executive director. In order to ensure that complaints about staff are resolved fairly and expeditiously, they will be handled as follows:

Complaints about staff other than the executive director. The executive director will promptly review all complaints about members of the staff other than the executive director. After reviewing the complaint, the executive director will take such action as they determine to be appropriate. Before taking any disciplinary action, the executive director will discuss the complaint with the staff member.

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* REPORTER'S NOTE: On August 14, 2019, the Court entered an order that mistakenly labeled a new rule, concerning the prompt resolution of complaints, as IOP 9.207(B)-12. That rule should have been labeled IOP 9.207(B)-13 given that IOP 9.207(B)-12, concerning dismissal after a judge's opportunity to comment, already existed. The original IOP 9.207(B)-12 remains unchanged. This order properly labels the 2019 rule concerning the prompt resolution of complaints as IOP 9.207(B)-13.

Complaints about executive director. Complaints about the executive director will be provided to the Commission chairperson and vice-chairperson. The chairperson and vice-chairperson will promptly review each complaint. If it appears that some investigation or other action may be appropriate, the chairperson or vice-chairperson will provide the complaint to the entire Commission. The Commission will then decide, in executive session, whether to select three members of the Commission to act as a subcommittee to investigate the complaint and recommend a resolution. If the subcommittee will be recommending disciplinary action, the executive director should be given an opportunity to respond to the complaint. The Commission will then vote, in executive session, whether to accept the subcommittee's recommendation or take some other action.

IOP 9.207(B)-13 — PROMPT RESOLUTION OF COMPLAINTS

The Commission recognizes that the public and judiciary have a strong interest in prompt and fair resolution of complaints alleging a judge has committed misconduct. The Commission's goal is to

- review all complaints expeditiously and impartially;
- fairly and thoroughly investigate those that warrant further examination;
- accurately and impartially determine the merits of each complaint; and
- arrive at a just resolution as quickly as practicable.

IOP 9.207(B)-14 — PRACTICE REGARDING INVESTIGATION

It is in the interest of justice and the interest of the Commission to be aware of exculpatory information

prior to recommending any action other than dismissal of the RFI. To that end, after the Commission approves a full investigation, staff will make reasonable efforts to obtain all information that appears useful to determining whether there is misconduct, in order to ensure that the investigation is both thorough and fair. If a respondent asks staff to obtain and review information that appears both relevant and useful to determining whether there is misconduct, staff will take such steps as are appropriate to obtain that information unless there are circumstances that make it unreasonable to do so.

IOP 9.207(B)-15 — PRACTICE REGARDING DISCOVERY

MCR 9.232(A) requires disciplinary counsel to provide the following to respondents, at least 21 days before a public hearing is scheduled to begin: names and addresses of all witnesses that disciplinary counsel intends to call at the hearing; copies of statements and affidavits given by disciplinary counsel's proposed witnesses; copies of all exhibits that disciplinary counsel intends to introduce; and copies of all exculpatory information in disciplinary counsel's possession.

It is in the Commission's interest that public charges against a respondent be resolved fairly and on the basis of all relevant evidence. To that end:

- Unless there are circumstances that make it unreasonable to do so, disciplinary counsel will endeavor to provide discovery to a respondent as soon as reasonably feasible after the Commission files a public complaint, but no later than the time limit in MCR 9.232(A).

- Unless circumstances make it unreasonable to do so, disciplinary counsel will make available to respondent all witness statements, without regard to whether

disciplinary counsel intends to call the witness, and all evidence that is a part of the investigation, without regard to whether disciplinary counsel intends to introduce the evidence. In that way, disciplinary counsel will not be in the position of having to speculate as to what a respondent may consider to be "exculpatory."

Adopted December 14, 2022, effective January 1, 2023 (File No. 2022-53)—REPORTER.

On order of the Court, the following amendment to Local Court Rule 2.119 of the Oakland County Circuit Court is adopted, effective January 1, 2023.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.119 MOTION PRACTICE

(A)-(B) [Unchanged.]

~~(C) Appearance at the Hearing. If counsel for the moving party on a motion praeciped for hearing does not check in with the court clerk by 9:30 a.m., the court may dismiss the motion praecipe on its own motion or upon request of counsel for the opposing party.~~

If counsel for the opposing party in a motion praeciped for hearing does not check in with the clerk by 9:30 a.m., upon request of the moving party the clerk shall call the motion hearing. If appropriate, the court shall grant the relief requested.

Staff comment (ADM File No. 2022-53): The amendment of Oakland LCR 2.119 is necessary because its inclusion causes the court unnecessary delays.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.



HONORABLE STEPHEN M. MARKMAN

PRESENTATION OF THE PORTRAIT OF THE HONORABLE STEPHEN M. MARKMAN

NOVEMBER 16, 2022

JUSTICE BRIAN K. ZAHRA: Welcome to the MARKMAN bar mitzvah. [Laughter.] On behalf of my colleagues on the Michigan Supreme Court, it's my distinct pleasure and honor to stand in for Chief Justice [BRIDGET M.] MCCORMACK and preside over our presentation of the portrait of my former colleague and dear friend, retired Chief Justice STEPHEN MARKMAN. Our Chief would have been here this evening but for the fact that she herself is being honored at a ceremony in Washington D.C. She sends her regrets for being unable to be with us, and she asked me to pass on her best wishes to Steve and his family.

Many thanks and gratitude are also extended to the Michigan Supreme Court Historical Society and its board members. Do we have any board members here? Yeah. Thank you very much for your service. The Historical Society has played a significant role in the restoration, preservation, and maintenance of many of the portraits of the Justices of the Supreme Court. On behalf of the current and past members of the Court, please accept our gratitude for your dedication and commitment to the Historical Society.

I would also like to recognize former members of the Supreme Court who are in attendance, and I'm not

quite sure who all is here. I know Chief Justice [MICHAEL F.] CAVANAGH is here. I saw him. MIKE CAVANAGH. Thank you for being here. Chief Justice BOB YOUNG. Justice KURT WILDER. Thank you. We're going to hear from Justice [CLIFFORD W.] TAYLOR later in the program, but he's participating in here. Any other former members of the Court? Well, thank you for your attendance.

STEVE MARKMAN served more than 24 years in Michigan's judiciary, 20 years as a Justice of the Michigan Supreme Court. Most lawyers would consider this a remarkable and distinguished career in public service, but Steve gave so much more of himself to the public, and I'm sure you'll hear from the many other speakers about his many areas of public service. There is, however, one area of public service I find remarkable, which I will take the liberty of discussing.

In 1985, Steve was nominated by President Ronald Reagan and confirmed by the Senate to the position of Assistant Attorney General of the United States. In that position, STEPHEN MARKMAN was in charge of the Justice Department's Office of Legal Policy. In that role, Steve, among other things, assisted the President and the Attorney General in the judicial selection process. Then-Assistant Attorney General STEPHEN MARKMAN promoted the notion of original-meaning jurisprudence throughout the Justice Department. During Steve's tenure, the Office of Legal Policy published a source book on original-meaning jurisprudence, which described this jurisprudence as "the enterprise of attempting to interpret the provisions of the Constitution as those provisions were generally understood at the time of their adoption by the society which framed and ratified them."

With STEVE MARKMAN's assistance, President Reagan elevated Justice William Rehnquist to the position of Chief Justice and nominated Antonin Scalia and Justice Anthony Kennedy to the Supreme Court of the United States. Steve also materially assisted in the nomination and confirmation of 230 other federal judges, including Judge Richard Suhrheinrich, who we will hear from this evening; Judge Paul Gadola, father of Court of Appeals Judge MICHAEL GADOLA; and Judge Lawrence Zatkoff, my mentor and the federal district judge for whom I clerked. On his last day in office, President Reagan presented Justice MARKMAN with a handwritten note, thanking him for his service to the Reagan Administration and his service to the people of the United States of America. I say all this to point out that Chief Justice MARKMAN greatly influenced our nation's jurisprudence, and his contribution to the law goes well beyond the great state of Michigan.

As a member of the Michigan Supreme Court, Chief Justice MARKMAN developed a reputation for being a thoughtful and exceptionally well-prepared jurist who always asked piercing and probative questions of counsel. I personally marvel at the way in which he could distill a highly complex and difficult case down to a handful of poignant questions—questions that addressed, as he would often say, not just the case before the Court but the next 100 cases to come before the Court. Steve was a self-proclaimed devil's advocate, and I mean no disrespect at all when I state the devil could have no better advocate than STEVE MARKMAN. [Laughter.] To the contrary, I offer this observation with my utmost admiration for Steve. For some, STEPHEN MARKMAN is a lawyer's lawyer and a judge's judge who has materially enhanced the quality of our legal profession.

We have a long list of highly esteemed speakers tonight, but there's one person who is conspicuously absent from this list of speakers, and that is because he is no longer with us. Court of Appeals Judge JONATHAN TUKEL was a former Assistant United States Attorney hired into the U.S. Attorney's Office by Chief Justice MARKMAN. Judge TUKEL was a close and dear friend of Chief Justice MARKMAN and a dear friend of many in attendance tonight. He died of cancer a little more than a year ago. His time on this earth was far too short. May we please have a moment of silence to remember Judge TUKEL. Thank you.

Our first speaker this evening is my recently re-elected colleague Justice RICHARD BERNSTEIN. Richard and Steve served together from the beginning of 2015 to the end of 2020. During that time, the Court issued over 200 opinions. It will shock nobody when I state that Steve and Richard approached the function of judging from wildly different perspectives, and while I did not bother to count the cases, there are good many cases in which Richard and Steve completely and resoundingly disagreed with each other. Nonetheless, I'm sure they would agree that they greatly enjoyed and respected each other. Justice BERNSTEIN, the floor is yours.

JUSTICE RICHARD H. BERNSTEIN: There are certain people that just truly define what it means to be a judge. There are certain people who have the character, who have the temperament, who have the sophistication. And we can talk about the incredible accomplishments of Justice MARKMAN. We can talk about his time at the Department of Justice. We can talk about his time on the Michigan Supreme Court. We can talk about his time as a jurist.

But what makes Steve so incredibly special is he serves with an incredible humility. He serves with an incredible kindness. He serves with an incredible warmth. For I like to say that Steve is somewhat of a throwback. He's the kind of person that is always thinking about other people. He's the kind of person that will always let others ask questions before himself. He represents the idea of dignity. He represents the idea of worldliness.

Steve is someone that I really have become incredibly fond of. The reason that I have so much admiration for Steve is because whenever you had a chance to engage with Justice MARKMAN there was something quite remarkable about it. Is that he was a person, when he served on this bench, that was always intellectually honest. He was a person that functioned within a certain core set of values. He was a person that had a certain core ideology as it pertained to how he approached the law and his interpretation of it. But the greatest thing about STEVE MARKMAN is that if you approached him and had conversations about various cases and the impact of various cases, if you spoke to him with the jurisprudential philosophy that he followed, he was always open for conversation, he was always open for dialogue, and he was always open to people who could present an argument that he was willing to believe in.

And the thing that I admired so much about Steve is there were so many cases that he and I had a tradition after oral arguments, we would get together here in Lansing and go to his favorite restaurant—a restaurant that I absolutely love—and he loved talking about the cases. But his honesty, his honesty as it pertained to his intellect, as it pertained to how he saw these cases, how he saw these issues, he was always intel-

lectually honest. And if you were able to talk about a case but do it within the framework as to how he approached the law and the Constitution, he was always open to listening, he was always open to having a conversation, and he was always open, if you made the right argument, to looking at it from a different point of view.

And there were so many situations and circumstances where he and I would talk, and he would say to me, "You know, Richard, with your jurisprudential philosophy, you might not like the result. You might not like this result, but approaching it with the philosophy that you approach all other cases, this would be an equitable and appropriate result." And thanks to Steve's mentorship, there were a number of cases where ultimately, after having very intense conversations with him, I would ultimately write opinions that I wasn't happy with the result, didn't like the result, but would put a line in that simply said that ultimately this is now for the purview of the Legislature. That's what makes Steve such a profound person. That's what makes him such a great judge. He was a person who did this because he genuinely believes in service. He dedicated his life to service.

I conclude by saying this: I miss the conversations that I used to have with Steve every day on this Court. I miss coming to work and having a chance to see Steve every day. I miss his warmth. I miss his kindness. I miss his friendship. I miss the fact that he was always a person that when it came to his time at conference you would always listen with an intensity because when Steve speaks, he chooses his words carefully, and they all have meaning and profound value. And I think what's beautiful about Steve is that his legacy continues with his family, with his children, with his sons,

who when you meet them and talk to them and learn about them have that same humility, have that same warmth, have that same grace. I miss working with Steve. I miss the time that I had the opportunity to spend with Steve. But most importantly, I just miss having the opportunity to come to work and see my good friend.

JUSTICE ZAHRA: Thank you, Justice BERNSTEIN. Next, I'm pleased to introduce Judge Richard Suhrheinrich of the United States Court of Appeals for the Sixth Circuit. Judge Suhrheinrich comes from humble roots. Early in life, Judge Suhrheinrich became very interested in the life of Abraham Lincoln. He believed that if Abe Lincoln could become a lawyer from his humble beginnings, so, too, could he. Indeed, Judge Suhrheinrich proved to be a very successful lawyer. In 1969, he co-founded a firm that focused on medical malpractice defense litigation, and by 1984, his firm had approximately 75 lawyers working for the firm. President Reagan appointed him to the United States District Court for the Eastern District of Michigan in 1984, and in 1990, President George Herbert Walker Bush appointed him to the United States Court of Appeals for the Sixth Circuit. It's my honor to present to you Judge Richard Suhrheinrich.

JUDGE SUHRHEINRICH: May it please the Court. Judge MARKMAN, Judge MARKMAN's family, friends, and relatives of Justice MARKMAN, good afternoon. I was delighted when Steve asked me to speak. Over the last several years when I have been in a similar situation, I've always had Steve speak on my behalf, so it was my turn to speak on his behalf. The problem is he put blinders on me. He said, one, no jokes. [Laughter.] As if I had any humor or he had any. [Laughter.] Two, no sarcasm. And three, be over in five minutes. [Laughter.]

Well, the five minutes became easier and easier because everything I was going to talk about is in his biography and you've already heard. So please excuse me if I somewhat repeat.

Incidentally, my son came up to me and said, "Am I going to be your substitute?" And I said, "What do you mean?" He said, "Look at the name: Richard Suhrheinrich, Jr." Well, I'm not a junior. My son and I have different middle names. He's not a junior, so I don't know. Steve, where'd you get that? [Laughter.]

Well, with my limitations and trying not to repeat too much what everybody else has said, I got to thinking: what could I talk about? And strange as it may seem, the only thing I could think of was what Steve means to me and what I think of Steve. Steve, you've heard, is an intellect. I don't think there are many people that understand the Constitution as well as he does. As Justice ZAHRA said, he vetted most of the federal judges. You may be interested in the fact that I escaped that. I was not vetted by STEVE MARKMAN nor his committee. My political genius who ushered me through it got me beyond him. Otherwise, I probably wouldn't be a federal judge.

But I have read some of his writings. They're clear. They're concise. They make sense. They do what I keep trying to tell my law clerks, and that is kind of outline so that the reader can understand where you are and where you've been. That's all true. He lectures on the Constitution constantly. He has taught for 30 years at Hillsdale [College]. Most of us in this room at one time or the other have sworn to uphold and to defend the Constitution. But I daresay few of us have read it from the very first page to the very last page. But all of Justice MARKMAN's students have in the 30 years because he reads to them on their first class the Consti-

tution of the United States. The class is three hours long, one day a week, and frequently he lectures for three hours. Do you have any conception of the intellect that that takes?

Justice MARKMAN has been called upon, in this country all the time, to lecture on the Constitution, and if he's not lecturing, he's called upon to debate various aspects of the Constitution. We're very lucky in Michigan. We had two great constitutional experts, STEVE MARKMAN and Joe Grano, and we should always remember that. So intellectually, one thing that Steve means to me is that.

The second thing he means to me is courage. Steve doesn't go in for fist fights or anything like that; he doesn't have that kind of courage. But he is going to the Ukraine to take care of their judiciary. He and two scholars or other judges from Europe meet to discuss this—what should happen with the judiciary. And I said—he's going back in a couple weeks—I said, "Are you going to the Ukraine this time?" And he said, "If that's where they want me, that's where I'll go." "But in truth," he said, "I'll probably be in Poland." Well, Poland is pretty dangerous, too. It looks like the Russians may have just launched missiles on their behalf.

But STEVE MARKMAN has a courage that many of us don't have. He has moral courage. One of his colleagues from the Ukraine called him up during the war and said, "Look, would you take care of my wife and children until I can find something better for them?" And without a thought, he said, "Certainly, send them to my home." And he took care of them. Or, I should say, his wife took care of them. She has the most moral courage of both of them. So when I think of Steve, I told

you why I think of him intellectually. We still have lunch once or twice a month. When I think of Steve, I think of his courage.

And the third thing I think of is something, I thought, how can I express it so strongly? And I got to thinking about a movie, "Saint—Scent, rather, of a Woman," with Al Pacino. And in it he dances the tango. Now I'm not going to say STEVE MARKMAN dances to tango. I doubt if he even knows what it is. [Laughter.] But in that movie, Al Pacino portrays a United States Marine colonel who is blind, and he finds a young man in a private school to be his eyes for his last big weekend. Now Marine colonel is really something.

Let me tell you a quick story—has nothing to do with what we're talking about today. But when I was a U.S. District Judge, I was a colleague of George La Plata. George had the most beautiful white hair I think I've ever seen. He had a portrait of himself in his chambers with his blue Marine uniform on, gold buttons, gold sword. Just beautiful, I mean, just beautiful. Well, Charlie Joiner comes in one day, who is former Dean at University of Michigan Law School and a colleague of both George and mine and says, "George, why do you have your staff call you Colonel instead of Judge?" And George says, "How many federal judges are there?" Charlie says, "I don't know. Less than a thousand. About a thousand." George says, "There are not a thousand Marine colonels."

So that gives you some idea—that's supposed to be a little humorous. [Laughter.] That gives you some idea of the magnitude of which this movie was based on. Al Pacino discovers that this young man is about to be kicked out of the private school that he recruited him for to be his eyes for that weekend. And the reason he's about to be kicked out: something bad happened. He

witnessed the rich kids—he, of course, was the poor kid there on a scholarship—doing the bad thing. But in the Colonel's mind, he would not snitch or rat on his friends or his colleagues, so they had a big hearing—all the faculty was there, the benefactors were there, the students were there. And lo and behold, Al Pacino shows up to plead his case, and he brags about him, what he does, and he said, "You know, you're about to throw a man away because he has one thing: he won't snitch or rat on his friends." "And man"—as he slams down his cane—he says, "That's integrity."

Now we move to STEVE MARKMAN. After his first reelection, we were having lunch, and he says, "You know, I've been approached, maybe, to be a federal judge. What do you think?" I said, "What's to think? Other judges from this Court have done it; other judges have left." I said, "You make more money. You got a lifetime appointment. You don't have to run for election. What's the problem?" He said, "Well, I got to think about it."

And so he did, and we had lunch about two weeks later, and I said: "Well, you're going to announce your retirement? Go on the federal bench with me?" And he said, "No." I said: "What? Are you kidding me?" He said, "No." He said: "I got to thinking, if I did that, I would be disappointing the people that spent money to get me elected. I would be disappointing the people that worked on my campaign. I would be disappointing the people that voted for me. I can't do that." And so, in the words of Al Pacino, "Man, that's integrity."

So STEVE MARKMAN means three things to me: intellect, courage, and integrity. When you look at all these pictures, you can name all of the judges. You know, you might say, MAURA CORRIGAN—leader. You might say, CLIFF TAYLOR—philosopher. But when you

look at STEVE MARKMAN, you see integrity. A man with courage, intellect, and integrity can do almost anything. I think the beginning of his work in Ukraine is just the beginning. We may not have seen everything. But I know one thing: I am so proud to have him as my friend. Thank you. [Applause.]

JUSTICE ZAHRA: Thank you, Judge Suhrheinrich. Our next speaker has a very interesting background. He was a Michigan Supreme Court Chief Commissioner, which means he is incredibly smart and hard-working. As chief commissioner, you oversee the work of all the commissioners in the Supreme Court, and you attend the Court's conferences, prepare to answer any questions that may arise about any one of the cases from any member of the Court. Our current Chief Commissioner describes former Chief Commissioner Michael Murray as the gold standard for chief commissioners. This is due to his care and concern for the Court as an institution, his love for the law, and his sharp intellect. In 2004, Chief Commissioner Murray left the Commissioner's Office to become legal counsel for the Diocese of Lansing. In 2005, he was ordained a deacon in the Catholic Church, and in 2016, he was ordained a priest. He is currently the pastor at St. Martha's Parish in Okemos. It's my honor to present to you Father Michael Murray. Well, I'll clap for you. [Applause.]

FATHER MICHAEL MURRAY: May it please the Court.

JUSTICE ZAHRA: You can—come on this side.

FATHER MURRAY: We've heard almost a perfect summary of Justice MARKMAN from Judge ZAHRA—Justice ZAHRA, Justice BERNSTEIN, Judge Suhrheinrich. I'm going to go back to one moment, a long time ago, that I think is part of how we get there. It's November of 1999, Justice BRICKLEY has grown ill, has resigned. His

successor, Justice MARKMAN, has been appointed. And so in the old auditorium of what is today the Williams Building and was then the Law Building and before that was the beautifully and poetically named Seven-Story Office Building [laughter]—we gather in the auditorium, and we have the investiture of Justice MARKMAN. We have the swearing in by Justice MARILYN KELLY.

As on an occasion like this, people comment, say nice things, and in time, Justice MARKMAN, as he will today, is offered the opportunity for rebuttal. He talked a little bit about—he began to talk about judicial philosophy, but he almost immediately explained that he wasn't going to talk about judicial philosophy as it is often understood—the things that we take and we lump into imprecise and often simply inaccurate, insufficient words, like liberal or conservative or textualist or living constitution. He wasn't going to talk about any of that. He's going to talk about judicial philosophy in the sense of how you do the job. And it was in how you do the job that he both revealed many of the personal characteristics that Justice BERNSTEIN and Judge Suhrheinrich talked about, as well as eventually how this work plays itself out, something Justice ZAHRA talked about well.

He said he had five points—this is all in 461 Mich [Reports]. He said he had five points. The first few, I think, are really the key ones. The first one was: always remember that for every one of these cases, this is one of—perhaps the most consequential affair or endeavor of that person's life. This person is in litigation. They're probably not sleeping very well. They might not be eating very well. It's getting in the way of their family life. It's getting in the way of their work.

That doesn't take in any particular outcome of the case, but it's what you need to remember as we do the work on the case.

And the second one he talked about a little bit, and he amplified it later on in days to come, when he spoke to some of the Court staff. He talked about how a judicial opinion—a good judicial opinion—is often written, as he said, for the party losing the case. The party winning the case—it goes to the bottom line, reads the last sentence, and cheers. It isn't necessarily all that interested in how the Court got to where the winning litigant wanted them to go, but the loser needs to know that the Court really listened and understood.

His third point was about oral argument, and it was of the same ilk: talking about how, at an oral argument, one can test what may become the rationale of the winning side, giving the loser—the possible loser, the prospective loser, the way the case seems to be going internally at the Court—an opportunity to respond to whatever might be the rationale ultimately used against them. As he amplified his second point, though, I think he really got to what underlies what several of these speakers have spoken of, which is he talked about how a judicial opinion needs to deal honestly, forthrightly, respectfully with the losing party's strongest arguments.

Now, if a losing party's got 14 arguments, they don't all have to be addressed. But the losing party—their best arguments have to be honestly faced, honestly addressed, and honestly analyzed. You know, it's no secret we live in a society today in which it is often asserted that opposing points of view are utterly without merit. We have two differing approaches on how to solve a problem. Then it's not that we have two differing approaches on how to solve the problem—it's

often pretended that the other side, well, they don't even want to solve the problem; they want to make the problem worse. No, they've got another approach to the problem.

It's interesting, you go a little farther along in my own life, and I get handed [Saint Thomas] Aquinas's Summa—his life's work. His life work was to go through fundamental Christian doctrines and begin with the very best arguments that he could find or muster himself as to why these things are not true. Did God create the world? Is this world a product of love? Smaller things. Are there angels? Are there not? Is there eternity? And so for every one of these questions for years and decades, Aquinas begins with the very best arguments he could find for why these things are not true. What's the best argument a skeptic can muster, and then Aquinas sets about to answer it.

What Justice MARKMAN talked about that day about the importance of respectfully and honestly addressing the arguments that ultimately are not going to prevail, obviously it's what Aquinas was about. It's something we talk about all the time with the kids. I'm blessed to be at a school. We get middle-school kids in, we talk about current issues, and we make sure that's how we approach it. Baked into that, of course, is these personal characteristics of patience, of kindness, of humility.

In my current line of work, I hear confessions, and at the end of a confession, you give a penance. And we explain to the kids that penance is not punishment. Penance is the next good step in the right direction. So your [i.e., the audience] penance: if we take something from here, let's take our own commitment, when talking with someone with whom we disagree, that we really listen, and we really consider the possibility that

they might be right and make sure that we are fairly addressing in our own minds and hearts the best arguments they've got for where they are. Thank you very much. [Applause.]

JUSTICE ZAHRA: Thank you, Father Murray. Our next speaker is a Michigan Supreme Court appointee to the Michigan Attorney Discipline Board, where he currently serves as the Board's vice chair. He formerly served as the Grievance Administrator for the Michigan Attorney Grievance Commission. Prior to his service with the Commission, he was a professor of law at Western Michigan University Thomas M. Cooley Law School. He taught courses in criminal law, criminal procedure, evidence, and white-collar crime. Prior to teaching, he worked for nearly 30 years in the United States Attorney's office in Detroit. In 1989, he was named chief of the Criminal Division, I believe, by then-United States Attorney STEPHEN MARKMAN. It's my pleasure to introduce to you Alan Gershel. [Applause.]

ALAN GERSHEL: Thank you. Turning your back on the Court—that's usually not a good thing to do. [Laughter.] Thank you. I have had the pleasure of knowing Justice MARKMAN for over 30 years. He has been my boss, and he's been my friend. We began working together when he was appointed the U.S. Attorney for the Eastern District of Michigan in 1989. Shortly after he became the U.S. Attorney, he appointed me as the Chief of the Criminal Division. I appreciated and valued the trust that he placed in me.

In my almost 30 years I was in the U.S. Attorney's Office, I worked for many U.S. Attorneys. In my opinion, Justice MARKMAN was one of the smartest, most dedicated, hardest working, and innovative individuals I've worked for. He displayed a passion for

public service and a deep commitment to the citizens in the Eastern District of Michigan. It was apparent to all of us who worked in the office that he truly valued the work and the role we played in the administration of justice.

Many of the principles he said to me regarding our responsibilities as prosecutors were deeply held and have stayed with me all these years. Here are but a few examples—I think they're reflective of his character. First, one of the most important functions of government as enshrined in our Constitution is the protection and security of its citizens. And many of the programs that he initiated, both law enforcement and community-based, reflected this. Two, we are doing the public's business, and as a result, we have a duty and a responsibility to inform them of our work. This included not only our successes but also unfavorable decisions. He may be the only U.S. Attorney I worked for that issued press releases when we lost a case. He also said—and as a career prosecutor, this resonated with me my whole career—there was no greater responsibility as a prosecutor to try and take away someone's liberty. It must be done fairly, and it must be done with integrity.

He was a hands-on leader, and I mean that in a positive way. He wanted to know about cases, both criminal and civil. He would often participate in meetings related to the status of the case. Everyone in the room was encouraged to speak frankly and honestly. He encouraged debate. He would ask questions, often difficult ones, but all designed to be sure that the matter we were discussing had been fully aired and thought-out. He genuinely wanted our recommendations. No one ever felt, "I can't say that to the boss."

Very early on in his tenure, he recognized the importance of reaching out to the defense bar to get their perspective on the work of the office. He had me assemble a representative group of criminal-defense lawyers who practice in federal court. I recall the meeting. There was frank and honest discussion. Justice MARKMAN asked many questions where there may not have been agreement on all issues. I believe everyone in that room who participated in that meeting felt that Justice MARKMAN closely listened to their concerns and was genuinely interested in what they had to say. The meeting sparked review and revision of several existing office policies and practices.

Justice MARKMAN often carried with him index cards —those of you from the office in those days remember, probably remember, this—with notes on these cases. When he came to see me with his cards, I first felt a little bit like the law student in the movie "Paper Chase," being called on by Professor Kingsfield. After once or twice, I have to admit, I was not prepared; it didn't happen again.

However, there's a significant difference between being an involved and engaged leader and being a micromanager. He was undoubtedly the former. He recognized that prosecutorial discretion executed under a framework of carefully thought-out policies was necessary both institutionally and for morale. I also remember Justice MARKMAN telling me that every case is different and presents its own challenges and difficulties. The charging and resolution of a case cannot be solely dependent on a serendipity of an individual prosecutor. To allow this is not only unfair to the defendant, but it also breeds disrespect and mistrust for the system. There needs to be a standardization

while allowing some flexibility in the exercise of prosecutorial discretion. A proper balance needed to be struck.

In this vein, under his leadership, there was the creation of a formal guilty-plea approval process as well as a wholesale revision of our prosecution guidelines. We also instituted a formal discovery policy with an emphasis on disclosure of information. There would be no trial by ambush. Our rule of thumb became that even if certain information was arguably not disclosable under caselaw, if it doesn't pass a smell test, we should release it. The criminal justice system is a fairer system when we share information and allow sunshine into the process. I carried that guidance the rest of my career.

There were many initiatives that we took during Justice MARKMAN's leadership. He included a formal training program for law enforcement, especially for the newer agents, as well as the formalization of a pretrial diversion program for placing nonviolent defendants with no criminal history into a supervised program to give them a second chance without being saddled with a criminal conviction. Another significant program initiated during this time was the development of a robust community-outreach program. Many of the prosecutors in the office at that time were skeptical about taking on this nontraditional role. Eventually, they came to appreciate the important—this important function.

Justice MARKMAN helped establish what was then known as the Downtown Executive Club, which consisted of business, political leaders, and law-enforcement officials who planned projects to improve the downtown area. In addition, a program called Weed and Seed was established; its purpose was to

create a partnership with law enforcement and community groups and improve security through judicial —through youth education and crime prevention projects. Assistant U.S. Attorneys spoke to community groups and schools. Because of increased violence in the metropolitan area at that time, the prosecution of gun crimes became a top priority, as well as drug gangs. With respect to drug gangs, Justice MARKMAN recognized that success in this area would be enhanced by partnering with our local officials. So, at that time, we engaged in a lot of cooperation with state and local prosecutors and law enforcement personnel.

Under Justice MARKMAN's leadership, the office was in the forefront of the prosecution of doctors and pharmacists who illegally distributed controlled substances, such as pain medication. This was long before this became the nationwide problem it is today. During his tenure, several significant criminal cases were initiated, including a public corruption probe involving several judges who were accepting bribes in disposing cases. There was also the investigation and prosecution of the top tier of the Detroit Police Department for embezzling millions of dollars, resulting in the convictions of the police chief and others.

One day, Justice MARKMAN came to my office and said he wanted to try a criminal case. My initial reaction was admittedly skeptical. I thought, "How are you going to find the time to do this given the demands of the job?" He told me this was important to him. This wasn't a bad impression of staff; rather, he genuinely wanted to experience what it was like to try a case and experience what the staff had to do on a daily basis. As a result, Justice MARKMAN became one of the lead prosecutors in a case involving a notorious and violent

drug gang. As I look back, Justice MARKMAN may have been the only U.S. Attorney to actually try a case.

Our professional paths crossed again when I was the Grievance Administrator and he became the Chief Justice. I always appreciated his support and an open-door policy where I could speak frankly on matters involving attorney discipline in our state. For that matter, I had the same experience with Chief Justice YOUNG and Chief Justice MCCORMACK. All were genuinely interested in the work of the Attorney Grievance Commission and always asking what I needed. I thank you all for that.

In closing, thank you, Justice MARKMAN, for the trust you placed in me and for your friendship. I wish you the best of success and good health as you enter the next journey in your life. May it be satisfying and rewarding. You have earned it. Knowing you as I think I do, I believe something Justice Sandra Day O'Connor said after she retired is apropos. She said, "I need to retire from retirement." I suspect that will likely be you. Congratulations. [Applause.]

JUSTICE ZAHRA: Thank you, Mr. Gershel. Next, we will hear from Cheryl Nowak, Chief Justice MARKMAN's longtime senior clerk. Cheryl graduated from MSU's College of Law in 2000, and her first and, up until Steve's retirement, only job was law clerk to Justice STEVE MARKMAN. In 2021, Cheryl joined our Supreme Court Commissioner's Office, where she has served the Court admirably. Now, long before I joined the Court, it was rumored that STEVE MARKMAN was a demanding employer. [Laughter.] Some might even say he was a difficult employer. How Cheryl not only survived but thrived in this working environment is a mystery to many of us in the Court system. Perhaps Cheryl will confirm some of these rumors and tell us all about it

tonight. [Laughter.] I know you didn't want any jokes, Steve. I had just one. But in all seriousness, the bond between the law clerk and the judge is a strong one, one that lasts well past the period of the clerkship. Cheryl will speak on behalf of the many clerks who were fortunate enough to have clerked under Chief Justice MARKMAN's tutelage. Cheryl, please take the podium. [Applause.]

CHERYL NOWAK: Thank you, Justice ZAHRA. Yes, it is so good to see so many of Justice MARKMAN's former clerks here tonight. It's very nice to see them. Good afternoon. My name is Cheryl Nowak, and I had the honor of working for Justice MARKMAN for 20 years, first as his law clerk and then his senior law clerk. I'm very thankful that he gave me that opportunity.

My husband and I are both from up north, and when I was a third-year law student, I had a job lined up at a small law firm in Traverse City. I was going to have a view of the bay. But before that happened, I received a phone call from Justice MARKMAN asking me if I wanted to come in for an interview. I did, and he miraculously offered me a job. My husband and I talked it over and decided that I could not turn down such an amazing opportunity. Everybody that I talked to about Justice MARKMAN told me that he was a brilliant Justice.

So my husband and I decided that we would stay in Lansing for one more year and then move to Traverse City. But that one year turned into 20 years—and before we knew it 20 years. But I do not regret it at all. I was so fortunate to have Justice MARKMAN as my mentor right out of law school. Everybody that I had talked to was right. Justice MARKMAN is truly a brilliant man. I have learned so much from him over the years. When I first started working for him, I was in

such awe of him, and I could not understand why in the world he would possibly be interested in my thoughts on cases. It was one of those "pinch me, because this cannot be real" moments in my life. But fortunately, it was very real.

Although I worked for him for 20 years, I never stopped learning from him. And it wasn't just legal knowledge that I learned from Justice MARKMAN; I also learned the importance of being a good public servant. Justice MARKMAN would frequently remind us that the people of the state of Michigan were counting on us to carry out the rule of law.

If I had to describe Justice MARKMAN with just one word, it would, without a doubt, be dedicated. I have never met somebody more dedicated to both the rule of law and the people of this great state of Michigan than Justice MARKMAN. One thing I can say with certainty is that the taxpayers of this state got way more than their money's worth from Justice MARKMAN. He eats, sleeps, and breathes the law. I hope that, in his retirement, he is taking a bit of a break, but I have my doubts. [Laughter.]

Law is his passion. Every morning Justice MARKMAN would come into the office ready to talk law because he had been thinking about something all night and he had new thoughts to share and discuss. I don't think that the man sleeps. Many times, I would get e-mails from him in the middle of the night about work. Luckily, he did not expect me to respond in the middle of the night, but first thing in the morning it was "go time." This man's mind went a mile a minute, and it was often hard to keep up with him, especially if I hadn't had my coffee yet, which was often the case.

He always talked about how every case was important because every case was important to the parties

involved. And he desperately wanted to get every single case right. He would spend hours upon hours upon hours thinking about the cases before the Court. He is a bit of a perfectionist. When writing opinions, he would strain over every word to ensure that he was using just the right word for the situation. I remember one time when we were trying to decide whether to use one of two different words—I don't remember exactly what two words we were going back and forth between —but I do remember thinking to myself, "Don't these two words mean exactly the same thing?" [Laughter.] He must have read my mind because he pulled down his Oxford Dictionary from his shelf, and he explained to me that the two words did indeed have subtle differences. So another lesson that I learned from Justice MARKMAN is that words matter.

If I was given another word to describe Justice MARKMAN, it would be integrity. I swear we did not coordinate speeches. [Laughter.] I'm cheating—kind of cheating—by choosing the word integrity because it encompasses many words that describe Justice MARKMAN, such as trustworthy, dependable, and loyal. Like Jim Carrey in "Liar Liar," I don't think that Justice MARKMAN is capable of telling a lie. And when he says that he's going to do something, you better believe that he's going to do it.

Justice MARKMAN was always very helpful to clerks looking for jobs. He would not just write a letter of recommendation and call it good; he would talk to them about what they wanted to do, and he would pick up the phone, and he would make calls for them. I know that many doors were opened for clerks by him doing just that for them. I also know that Justice MARKMAN is a big reason why I am fortunate enough to still be working for the Court now in the role of a

commissioner, and I am very grateful to him for that. I can't say that Justice MARKMAN was the best boss ever, though, because my current boss is in the room. [Laughter.]

I must, at this time, give a shout-out to Keri Perkins, who was Justice MARKMAN's judicial assistant almost the whole time that he was a Justice. She was a rock for all of us in Justice MARKMAN's office. If it wasn't for her, none of us would have known what we were doing. Thank you, Keri.

Finally, I must mention Justice MARKMAN's love of children. My kids are 19 and 16 now, and they still talk about coming to work with me when they were younger and had days off from school. Justice MARKMAN brought a huge box of toys into the office for my kids to play with on such occasions, and he would actually get right down on the floor to play with them. He would also let them play with other things in his office, including fragile objects, which also always made me nervous. [Laughter.] And he enjoyed racing down—racing them down the hallways of this very building.

It should come as no surprise, then, that his favorite event of all the events that he participated in as a Justice was Adoption Day. He always said that it was the most joyous occasion to take place in the courtroom. I think that his favorite pictures he had up on his walls in his office in the Hall of Justice were pictures from different Adoption Day events across the state. He would always proudly show these pictures to his guests.

And I know that he is now enjoying spending time with his own grandchildren. He even brought one of his grandsons to my son's open house this summer, and my daughter and him played cornhole together. I hope that Justice MARKMAN knows how much I truly appreciate

everything that he has done for me over the years. Words cannot express how grateful I am that I had the opportunity to learn so much from him and how proud I will always be to say that I clerked for the Honorable STEPHEN J. MARKMAN. Thank you. [Applause.]

JUSTICE ZAHRA: Thank you, Cheryl. Next, we will hear from John Engstrom. John started his career off as law clerk to the Honorable Ralph Guy of the United States Court of Appeals for the Sixth Circuit. He then practiced law at Dickinson Wright before joining the United States Attorney's Office, where he served under then-United States Attorney STEPHEN MARKMAN from 1989 to 1992. John continued to serve in the United States Attorney's Office until 2010, when he became Resident Legal Adviser to the United States Embassy in Ukraine. From 2013 to present, John has served as Resident Legal Advisor to the United States Embassy in Turkey. Mr. Engstrom, the floor is yours. [Applause.]

JOHN ENGSTROM: May it please the Court. Well, this has been a very inspiring evening, and I appreciate what everyone else has said. They've stolen some of my thunder, but I do have a few unique things to tell you about STEVE MARKMAN. I think I'm going to focus on the fact that back in the 1990s when I was in the U.S. Attorney's Office and Steve was the U.S. Attorney, he had his hands full. He was learning how to be the U.S. Attorney. He was learning about all our different cases. As Alan mentioned, he really didn't know about our cases, and he asked us questions about them.

But his intellectual curiosity was such that he was persuaded by the Department of Justice to go twice to Ukraine in the early 1990s to work with the Ukrainian government on drafting a constitution. And you can all go home and Google the Ukrainian Constitution and see whether they followed any of Steve's ideas. I can

tell you it's about 50 pages long, so I'm not sure that they really understood Steve at that time, but that's his service. He went there. He was curious. And he came back.

And when he came back, I remember, particularly, he set up a Monday lunch—a brown [bag] lunch event in the U.S. Attorney's Office, and he invited all the prosecutors to come to that. And he sat down, and he told us stories about a post-Soviet Ukraine. And I can honestly say, in 1991 or '92, I could not have pointed to Ukraine on a map. I didn't really even understand what the relationship between Ukraine and Russia was. It meant nothing to me at that time.

But the one thing I remember Steve telling us at that meeting that stuck with me is that we should no longer call Ukraine "the Ukraine." Get rid of that definite article, because we would never call Belgium "the Belgium." We would never call France "the France." Ukraine is now an independent country, and it deserves its name: "Ukraine." And that's a lesson that was very important to Ukrainians, and I think a lot of Americans are still struggling, especially if they're of our generation. It's easy to go back to the habit of calling it "the Ukraine." But Steve quickly ended that, and it stuck with me ever since.

And I have to say to Father Murray, I remember Steve's investiture here in the Court, and, in fact, right after that, I sent Steve an e-mail and asked him if he would send me a copy of the speech that he gave because it meant so much to me. It was very inspirational. And that's another memory from back in the days.

Well, after Steve had gone to Ukraine and he served as U.S. Attorney, I continued as a prosecutor in Detroit and had the opportunity in 2010 to move to Ukraine

and to work as a Resident Legal Advisor on behalf of the Department of Justice in our embassy there. And generally, what I did was to work with their criminal justice system—whether it was the judges, the prosecutors, detectives, even defense attorneys—to try to strengthen their criminal justice system. And what was supposed to be a three-year relationship with Ukraine is now a 13-year relationship with Ukraine. I moved back there in 2019 to again work directly with people there.

And in 2020, it was a perfect opportunity. Steve was retiring from the bench, and I called him up, and I said, "Would you be interested in doing some work in Ukraine again?" Because I knew he always had a curiosity about Ukraine. And he was. So, I first set him up with virtual meetings with some of the judges in the High Anti-Corruption Court. And I remember we talked about writing a good judicial opinion and the importance of writing for the loser, which goes back to that investiture speech. And Steve's relation—ability to relate to the judges in Ukraine was clear, even in a virtual meeting.

And I—after that, the United States and Europe and other donors—donors to the country—decided that Ukraine really needed to do much, much more to reform its judiciary. Sadly, Ukraine's judiciary is and always has been fairly corrupt and not very well-trained either. And so there's a program that was set up where there's something called the High Counts—or High Qualifications Commissions of Judges, and this is a group of judges that will select the judges that will fill vacancies on—in the Ukrainian judiciary. Well, if you look at the judiciary as a clan,

that group has traditionally selected the worst judges to be judges because it protects them, and everyone continues on.

And so the program, now, was to bring in three international experts that would be able to sit with three Ukrainian judges on a panel, and they would vet all the candidates that will be on that—that commission. And if that works, it has the opportunity to really transform the court because right now the court has 2,047 vacancies. It should be at about 5,000 judges; it now has 2,000 vacancies. So, this commission is going to have the opportunity to almost fill half of the court right away.

And Steve's job is to vet all the candidates, and with three votes from international experts, any candidate can be removed from the pile. And so the job that Steve has is a very, very important job in Ukraine. And I know when I talked to my colleagues in the U.S. government—in the U.S. embassy—and said, "STEVE MARKMAN would be a good person for this position," they'd never heard of him. He wasn't someone that did a lot of international programs with the Department of Justice and—but I convinced them that I know Steve, and I know that he is going to take this very, very seriously. He will not be going to Ukraine and drinking vodka and enjoying the high life that many diplomats do. He'll be there working in his hotel room late in the evening.

And so he came, and I remember last year at this exact time, he came to my house—my apartment in Ukraine—and we had a Thanksgiving dinner that was one of the most wonderful dinners, and it was made particularly wonderful because Justice MARKMAN was there. And he had these Ukrainian officials there at the table, and he asked so many probing questions. And

they loved him, and he loved them. And it's a relationship that's continuing as of today.

As Father [Murray] mentioned, Steve even took some—a Ukrainian family into his own home and opened the door for them in a time of crisis. So, in conclusion, as you can see, Justice MARKMAN's commitment to the rule of law did not end with his retirement from the bench. I'm not a Ukrainian. I don't speak Ukrainian very well, and I certainly can't speak for the Ukrainian people, but I can assure you there are many Ukrainians right now that are very grateful for the fact that STEVE MARKMAN is working in their country to try to assist them in reforming as they assert their sovereignty and look to the West for assistance. So, I thank you, Steve, for all you're doing for Ukraine, all you've done for my career over 30 years. I'm grateful, and I look forward to seeing your portrait. [Applause.]

JUSTICE ZAHRA: Thank you, John. I will now call upon retired Chief Justice CLIFFORD TAYLOR to introduce our next speaker. Chief Justice TAYLOR served in the Michigan judiciary for 17 years, 12 years on the Supreme Court. In four of those years, he served as the Court's Chief Justice. After leaving the bench, Chief Justice TAYLOR joined the Miller Canfield law firm. Currently, Cliff is fully retired and enjoying his grandchildren. Notwithstanding his distinguished legal career, it is widely known that Chief Justice TAYLOR possesses just the second-best legal mind in his household, behind that of his spouse, Lucille. [Laughter.] Chief Justice TAYLOR, please take the podium. [Applause.]

JUSTICE CLIFFORD TAYLOR: Thank you, Brian. I appreciate that. I am just recently turned 80, and it seems to me most of my adult life has been spent being the warm-up act for John Engler. [Laughter.] I've—because of that, you're going to have an interest in

warm-up acts as a general matter, and I've learned that in the old world of vaudeville and burlesque that they used to always have an opera singer or someone equally boring who would perform before the stripper, and that's sort of the way I see my role today. [Laughter.]

John Engler and I have been friends for a long, long time. [Continued laughter.] Yeah, you're in for a treat. But, in any event, John has had probably the most interesting career of anybody in public life that was a contemporary of mine. He wrote a thesis in his senior year at—in college about how to run for the Legislature and proceeded to put it into effect and went back to Beal City, his home, ran for the Legislature, and won. Came to Lansing and served in the House for eight years, during which time he was a stickler for the rules and was able to get a lot of things done that he thought were important, and other Republicans did, because of his knowledge of the workings of the body.

In '78, he ran for the Senate and was successful. And then in the mid-80s, [he] was involved in an effort to create recalls for several Democrat legislators in the Senate, which were successful, which culminated in John becoming the Senate Majority Leader. And in that position—there was then a Democrat Governor, James Blanchard—and in that position, he was involved in affecting a number of compromises in very contested areas of Michigan law, such as workers' compensation and governmental immunity. I think it was dismaying to John when those compromises many times would be compromised by the judiciary itself.

And I think from my many conversations with him about this that he concluded that there's a great divide in this country and particularly in Michigan on how powerful judges should be in the making of public

policy. Should the judiciary be muscular in remolding statutes that seem to them poorly drawn or conceived, or should they be deferential to the legislative product? Such deference means, of course, no remolding. There are and have been judges of both stripes in our state, and the appointing governor in making his selection inevitably chooses from one camp or the other, even if he doesn't know that's quite what is happening.

Governor Engler fully understood this and chose judges, including STEVE MARKMAN, who would be deferential to the legislative work. He saw this as consistent with the theory of our government that the people, via the Legislature, make the rules or laws that they live under, and the deconstruction or augmentation of those laws is beyond the judiciary's authority. It is this theme that ran through his Supreme Court appointments. It accounts, I think, for my appointment, for MAURA CORRIGAN's appointment, for BOB YOUNG's appointment, and, of course, the final of the four, STEVE MARKMAN.

His appointments have been, I think, true to this notion of his that that was what a judge was supposed to do. This was a controversial view; in fact, it still is today. I think recently you can see this controversy where it's had in the discussions concerning *Roe versus Wade*. STEVE MARKMAN was such a judge, and his arrival on the Michigan Supreme Court gave us the fourth vote to do this kind of jurisprudence that Governor Engler thought was important, and we did, too. Here to discuss his thoughts on this and Justice MARKMAN is my friend, John Engler. [Applause.]

GOVERNOR JOHN ENGLER: It is a delight to be able to join you remotely from New Hampshire. No, I'm not promising a presidential campaign. [Laughter.] [Indiscernible.] I think that Stephen, when he talked to me about it, and nicely invited me to partici-

pate, I said, "Well, I can't do it unless we can figure out a way to do it remotely." And Steve, thank you, and thank you to the staff of the Court for being so accommodating so that I can join all of you remotely tonight and be part of this because this is an important ceremony. It's the culmination of—at least the public-recognition phase officially—of Justice STEVE MARKMAN's tenure on the Court.

I'm reminded and appreciative of Cliff's generous—very generous introduction. It was Grantland Rice who wrote about the Four Horsemen at Notre Dame. In one sense, they represented, I think it was a famine, pestilence, you know, destruction, and, yeah, that's sort of what the progressives in Michigan thought when we had a Supreme Court of CLIFF TAYLOR, BOB YOUNG, MAURA CORRIGAN, and STEVE MARKMAN. But the core virtues that I think of that Court would be courage, integrity, wisdom, and intellect.

This was a Court that I was personally very proud of, and it was a delight to see that after several years, this Court—this Supreme Court finally was recognized as the finest Supreme Court in the country. And it truly was a rule-of-law court, and STEVE MARKMAN was the fourth appointment. His appointment, the opportunity, arose in 1999, and, you know, Steve—a lot of things have been said about Steve. I've had the chance to listen now for a bit of time to Father Murray, to Cheryl's comments, to Alan's comments, and John Engstrom's comments, and they touch on the ethics of Steve's legal career, his extra-legal activities outside the—extra-legal in the sense of [indiscernible] judicial, not illegal. But that—[indiscernible] [laughter]—that word can be gray.

And then I also know something else about Steve, he was a—and this problem was mentioned maybe at

some point, maybe Dick Suhrheinrich said this. But we could see this professor of constitutional law down at Hillsdale now. I think Steve taught 30 years [indiscernible] started in the early '90s down there. So, he's impacted a lot of students. In a few moments, I actually got a comment from one of the students I happened to find, but I wanted to talk about Steve, and I'll be brief.

I know this is probably overtime for everyone with a nice unveiling to happen yet and then a reception, but one of the things that Steve has always been [is] a scholar. I mean he's been someone who has paid attention, not just to the law, teaching about the law, and reverence to the Constitution, whether that's the U.S. Constitution or Michigan's Constitution. In the *Imprimis*, the Hillsdale [College publication] in 2010, I found an article where Steve had written about the coming constitutional debate. And he was citing in his article a work that he had done when he was in the Reagan Justice Department as the Assistant Attorney General, writing a paper for [former U.S. Attorney General] Ed Meese, and Steve's rather impressive recall, he comes to cite the paper, you know, verbatim just sitting there for others [indiscernible] Constitution in the year 2000, the choices ahead.

In this paper, he was worried about where we're going to be in 20 years. This was 1980 to 2000, but he also was suggesting that we might be wondering, if looking ahead, what that Constitution would be like in year 2030. Well, we're only eight years away, so I don't know, Steve, if some of the hopes and some of the fears—probably some of both—have been realized by now.

But in there, Steve was—themes that were to be part of his judicial career for sure. He worried that the division, really, of the democratic representative process was going to be under assault by activist judges. He said this: "The system of the judicial government in which substance follows the outcomes are increasingly determined by the federal government." So, he had that awareness of where we were headed, and he went into greater detail, obviously, in the article—made out some very solid arguments. They were arguments that certainly appealed to me, and I've always felt that each of the three branches—and I've had the privilege of serving in two of them and being leaders in two of the three branches—that each branch should exercise its powers appropriately and fully under the Constitution. But I never felt in the judicial branch that there was anything that appointed them as the Legislature. That was the legislative branch, and we were the folks, when I was there, that would pass the laws.

So, anyway, Steve, on the Court, was a Justice of great integrity and certainly a law-and-order Justice, as has been mentioned. Somebody who followed the law, applied it fairly—intellect, you know, off the charts. He's also, you know, quite a vote-getter, really. I'm pretty proud that I won three statewide elections, but so did Steve. He won three statewide elections. He, in 2000, [won] for the first time and then for full eight-year terms in 2004 and 2012. So, you look at Steve, you don't see a guy who's out there as a vote magnet necessarily. He's not someone you look at and say, this guy is a [indiscernible], yep, there he was unbeaten in three statewide elections and would have, had the constitutional age limit gotten him—not gotten him—he would still be serving on the bench, and we'd have to delay this portrait unveiling for some period of time.

I knew, though, you know, I said I had something for a student—I found something about a student. You know, Steve is a—he is a good communicator, but it was mentioned, I think, by Justice ZAHRA—and congratulations, Justice ZAHRA on your reelection, and I'm not sure who's on the Court, Justice BERNSTEIN, congratulations if you're sitting up there, of course, on your reelection, and I don't know if the Chief Justice is there, but, certainly, congratulations on your new role, helping America solve problems through arbitration rather than the legal system.

But this is what a student said about Steve at Hillsdale. Steve, if you've seen this before, but they were asked to rate Professor MARKMAN, and there were other grades I didn't cite, but this one I thought was pretty good. A student said this: "Probably the most harrowing course I've ever taken or ever will take. [Laughter.] A former Michigan Supreme Court Justice, MARKMAN is the strictest professor I've ever had, to the point of unreasonability at times." [Laughter.] People who work with Steve know that that is a possibility. [Laughter.] "That said, the course was phenomenally enlightening, and his lectures are gold mines on constitutional law. He's a genius and worth the trouble." [Laughter.]

I certainly thought that, you know, Steve is a genius, and he was worth the trouble. He did a great job on the Michigan Supreme Court, and he has given back to the state and to the nation with his service in many, many other ways. And, Steve, for me to be able to be here just for a little bit remotely and to say congratulations on your extraordinary tenure as a Justice of the Michigan Supreme Court. You've written opinions, and you've—frankly, you and your colleagues had the courage, in time, to reverse decisions that had gotten it wrong in

the past and—and do so with the logic that was compelling of reasoning. Now that it's in the records of the Court, it is the controlling view, and I suspect and hope that it will remain so for a very long time because you and your colleagues certainly made a lot of sense on the criminal law in Michigan and in, you know, a whole lot of other areas when we get over to the civil side as well.

So, this portrait that will hang there will represent a Justice who served with great skill and great intelligence and made tremendous, impressive contributions to the legal history of this state. And I'm just very proud that I can be part of this tonight. So, Steve, thanks for letting me come in remotely. Congratulations to you, Kathy, and the family and to all of your friends that are there tonight to celebrate. So, I salute you. Thank you. [Applause.] Now signing off.

JUSTICE ZAHRA: Okay, well, thank you, Governor Engler. My son is a student at Hillsdale College, and he took Justice MARKMAN's class last year. Steve, that was Kevin's review. [Laughter.] And he thought he was doing it anonymously. [Laughter.]

We're nearing the moment we've all been waiting for. Next, it's my pleasure to introduce to you Sam Knecht, the artist who created the portrait we are about to unveil. Sam is a retired professor of art who has taught at Kendall College of Art and Design, the University of Michigan School of Art, and Hillsdale College, where he chaired the Art Department from 1978 to 2013. Commissioned portraits by Professor Knecht are found in prominent public collections, including the Allan P. Kirby, Jr., Center for Constitutional Studies and Citizenship in Washington D.C., the United States District Court for the Northwestern

District of Ohio in Toledo, Michigan State University in nearby East Lansing, and the Thomas M. Cooley School of Law right here in Lansing.

This is the second of at least three portraits Professor Knecht will have displayed here in the Hall of Justice. He also painted the portrait of Chief Justice THOMAS GILES KAVANAGH, currently on display in Justice VIVIANO's office, and he is undertaking the difficult task of creating my portrait, and I thank you for that. Professor Knecht, please come forward and share your thoughts prior to the unveiling. [Applause.]

SAMUEL KNECHT: May it please the Court. I'll keep this mercifully brief. I couldn't add anything more to what the distinguished colleagues of Justice MARKMAN have already explained in brilliant fashion. I'll offer just a couple of personal insights in working with Justice MARKMAN on this project. It became [clear] early on in our discussions, some years ago, that he was someone who wanted to avoid frills, embellishments in art, and I felt like, okay, I think if you want just a factual approach, I think I'm your man. He seemed to agree. He likes the KAVANAGH portrait, which is frankly now hanging in the vestibule of the Court. So, I felt like, okay, I can be the Sergeant Joe Friday of portrait painting; you know, just the facts.

Anyway—but a couple of insights. He permitted me to bring my sketchbook into Court sessions, sit over there out of the way, and sketch while my subject was in his habitat and, you know, ideas were turning and turning. But as our discussions elsewhere went forward, I could see that he didn't want anything gussied up in this portrait. Just keep it simple, straightforward. So, I thought that was—that was very useful for me because in the—in the world of commissioned

portraiture, there's always at least two people making the portrait: the subject and the artist. It's a collaboration.

In meeting Steve in this building from time to time, I was struck in his office that he kept a board on the wall with postcards representing probably every county courthouse around the state of Michigan. And being a visual guy, I liked that. It told me something about his regard for the whole food chain, the network of law in Michigan, and as reminders of his place within that. Elsewhere, a few years apart, he conducted me on tours of the building so that we could together look at the other judicial portraits, and he was very kindly interested in my opinion of them. And, of course, I had no knowledge of judicial record in those individuals represented. But I could talk to him about style and, you know, here's somebody who was just getting a little too frilly with their brush work, you know.

And it seems to me that, in a portrait like this, the goal is twofold: you represent the person, and you symbolize the office. Now, representing the person is a matter of being realistic, attentive to color, shape, texture, detail, anatomy, of course, and so on. But what about character? The unseen things that don't immediately come to the eye. I felt privileged to be an observer in Court sessions, and in our e-mail correspondence, in meetings at Hillsdale, dinner in our home, and so, little by little, I could see that this, indeed, was a man of character. And, you know, with time going on, and certainly culminating in this occasion, I could see that my admiration continued to increase. It already started out at a very high level, and it just went up from there.

So anyway, we'll dispense with those remarks now, and I'm told that Steve would like his grandchildren to help me pull the veil off the portrait. [Moving toward the portrait with Justice MARKMAN's four grandchildren.] Okay, let's find out who you are. Who are you? [Young boy: Jack.] Jack. And you are? [Young girl: Lily.] Lily? [Lily: Yeah.] Great. And you are? [Young girl: Genevieve.] [Young boy: I'm Ben.] Okay, great. Well, you guys, you're going to step over here very carefully. Watch out for these lights. Step over there. Girls in the middle. Now, very carefully, we're going to grab the hem here. Reach up. Each of you come close and grab the hem, and when I say "pull," you pull, okay? Okay, ready? One, two, three, pull. [Portrait unveiled. Applause.]

JUSTICE ZAHRA: Now for rebuttal, we have retired Chief Justice STEPHEN MARKMAN. [Applause.]

JUSTICE MARKMAN: Well, I will not have a rebuttal or a refutation, but I also will not affirm anything that's been said today, too. [Laughter.] I'm very honored by everything that's been said today.

Let me tell you one story. I know that John Engstrom has heard this story. I hope he'll allow me to repeat it. This is a story from my first day on the job with the United States Senate Judiciary Committee about 45 years ago. I had been given a position as the Minority Counsel for the Senate Judiciary Committee, and I was there during my first week, and there was a conference of the entire committee—all the senators on that committee—and it was a very hot day in the middle of the summer.

And the chairman of the committee was a very senior senator from Mississippi by the name of Jim Eastland. He must have been about 85 or 90 years old at this point. And he'd been chairman of the committee

for many years, and I think he vaguely recognized me. He knew that I had been hired on the staff of the Judiciary Committee. He didn't know me well, but he knew I was from Michigan.

And in the middle of the meeting—it was kind of a sweltering day—he called me over to his side. This was the first time that I had really spoken to him directly. And he said, "Feel hot." I said: "Yes, sir. It is kind of hot. It's, you know, a hot summer day. Can I turn the air conditioner up? Can I do something to make it more comfortable for you?" And he grimaced at me and waved me away and told me to sit down. And I couldn't quite figure out why that response.

But a few minutes later, he called me back to him a second time. I went over there, this time a little more apprehensively. And he said, "Feel hot." I said, "Yes, sir. It's very, very hot in here, and I'd like to do anything I can to be helpful. Should I turn the temperature down? Should I turn the air conditioner up?" And again, he grimaced at me, this time a little more ferociously, and waved me back to my chair.

And at this point, the Majority Counsel—I was the Minority Counsel, the Republican Counsel—the Majority Democratic Counsel came up to me. He said, "Boy, you need to learn English." I said, "Well, what do you mean by that?" He said, "He wants to know whether Michigan Senator Phil Hart is here." [Laughter.] Senator Phil Hart—Senator Feel Hot. And I made it through that, but it was a very close call. And I was very appreciative that I remained on the Senate Judiciary Committee for some time after that.

This is obviously a very remarkable occasion, and I appreciate everything that's been said today. But let me offer a few comments on—a few miscellaneous comments. As I look upon the bench behind me, I do

recall with great pride that I am the possessor of a judicial record of the Michigan Supreme Court that will not soon be broken. I will be recognized for quite a long time, I predict, in the Guinness Book of Michigan Supreme Court Records.

My historic achievement is that I served as the junior Justice of this Court for longer than any other person in the 187 years of this Court. I served for more than 10 years as the junior Justice of this Court. In other words, I was the senior Junior Justice ever, and I'm proud of this. That meant that I was always walking into this courtroom last among the Justices. Always having my name at the very bottom of all orders and opinions. Having always to pour the coffee for the more senior members. [Laughter.]

But most and worst of all, it meant that I was the first in our conferences to have to cast my vote. I couldn't look at what anyone else had done. I couldn't say ditto. I actually had to come up with some—some rational statement as to why I would do this in the case or do that in the case. And it was a very tense kind of situation. But these were my burdens, and I believe I weathered them well for more than a decade.

Let me also congratulate my friends and colleagues who were kind enough to speak for me on the Court, Justice ZAHRA and Justice BERNSTEIN. I know, of course, what has weighed most heavily upon them for much of the past year during a lengthy reelection campaign was the exceedingly gloomy prospect that they might be unable to participate in today's event [laughter] if they did not prevail. It is inspiring for me to know that such a concern motivated both Justice ZAHRA [laughter] and Justice BERNSTEIN during their more difficult—their most difficult moments on the campaign trail. And I appreciate your gratitude for that.

And let me also thank the Court, if I might, for what they presented to me earlier this year at a Community Connections program that we held at Hillsdale College. The Court—the Justices of the Court presented me with four bound volumes of my 175 authored opinions. They presented me with that, and it was a wonderful, wonderful occasion for me. I'm grateful and appreciative for what they did, and I do encourage the Court to consider doing that for all future departing Justices.

Why do I say that? I say that for truly I have found that there is nothing that can sustain and console a retired Justice like myself more than to relax in front of a fire with a wine and to sit and read those books and to admire my own words [laughter] and to chuckle at my humorous phrases [laughter], to recall my clever retorts to my dissenting colleagues [laughter], and most of all to immerse myself in the best of my footnotes. [Laughter.] It's been a wonderful summer reading those cases, and I thank the Court for that honor.

And I would also like to extend to my former colleague Chief Justice MCCORMACK all best wishes upon her imminent retirement from the Court. She has been a diligent and thoughtful Justice and Chief Justice, and I wish her success and fulfillment in what comes next for her and her family.

Let me also, of course, take this moment to offer thanks and appreciation to many. I thank the Justices for their sponsorship and participation in this event, as well as nine other Justices with whom I've had the honor to serve on this Court. I thank my law clerks for their conscientious efforts in making my opinions appear coherent, and I am very proud of all that they have subsequently done in the practice of law after

they've left my office. And I thank, in particular, my senior law clerk, Cheryl Nowak, and my judicial assistant, Keri Perkins, for their 20 years of service on behalf of the people of Michigan.

I thank my friends who have spoken so kindly of me on my behalf this afternoon. I thank Justice ZAHRA for presiding today on what will soon be the beginning of his 30th year of dedicated judicial service on every level of the Michigan Supreme Court, the trial court, the Court of Appeals, and now, of course, for many years on the Michigan Supreme Court. I thank Governor Engler, who was in the ether here a few minutes ago. I thank Governor John Engler and his longtime counsel, Lucille Taylor, who afforded me this opportunity to serve on the Court.

I, of course, thank all of you in this courtroom and in this courthouse today who've adjusted and accommodated your schedules to join me on this occasion. I thank all those who serve in this wonderful Hall of Justice and all who serve on the judiciary of this state whose job it is every day to uphold the equal rule of law.

I thank Professor Knecht, whose portrait overcomes all the many limitations of the portraitee. [Laughter.] I thank Lynn Seaks for all that she has done in coordinating this event despite a full-time [position] at the very highest levels of the McLaren Hospital. I thank my friends and colleagues at Hillsdale College.

I thank my family for their support and my grandchildren, in particular, for the remarkable agility they demonstrated in unveiling this portrait while nonetheless appreciating their befuddlement at this entire event. [Laughter.]

And, of course, very much I sincerely thank the people of Michigan who have allowed me to serve on

their judiciary and most recently on the highest Court of their state over the course of five statewide reelections until I reached an age at which the Michigan Constitution viewed me as irrebuttably incapable [laughter] of demonstrating that I could serve any more on this body.

I'd like to conclude very briefly on this ceremonial last day to recall the commitments that I made 23 years [ago] at my investiture on my ceremonial first day. Several individuals have mentioned that, and I'm very honored that they took the time to look to some of the commitments I made on that first day. And I think such an accounting is worthwhile for a judge or any elected official to undertake, for those kinds of commitments and promises that a public officer make[s] define the terms of his or her public service, and they give definition and meaning and substance to his or her oath of office.

So, I did take a look at the commitments that I had made 23 years ago. I really did mean them. I've tried to live up to those. I've had 50,000 cases that have come before me on this Court, and in one manner or another, I have tried always to recollect the commitments that I made to the people of Michigan that I would do in these cases some of the things being mentioned today. I would write for the losing parties. I would do so because, of course, the prevailing parties will look to see the affirmed or the reversed as the last word of the opinion, and that will be sufficient for them. It's the people who've lost the case who need to be reinforced in the idea that the Court abided by the rule of law and didn't simply decide its decision on the basis of misconceptions or misunderstandings of the facts of a case or simply because they didn't like the cut of the jib of the individuals who are arguing the contrary position.

So, I did take a careful look at what I had promised to do, and I am proud that, despite all the imperfections of living up to those commitments and the flaws that I've made over the years, I did attempt to the best of my ability—and it was a limited ability, but it was the best of my ability—to do what I said I would do because I don't think there's anything more important in a public official than that he or she live up to the promises and commitments that he or she has made when he or she is seeking the support of the people. It's easy to make those commitments; it's harder to live up those—to those commitments. And I've not always lived up to them, but I've done my best to try to live up to those commitments, and I hope in some manner I've been successful.

So let me once again thank all of you for being here. Let me say, it's my honor to have served on the judiciary of our great state, and I am equally honored by the fact that so many of you would be here this afternoon. I very much look forward to the reception that we're going to have, and I hope you'll allow me to join you in conversation while we enjoy that reception. Thank you so much for what you've done for me. [Applause.]

JUSTICE ZAHRA: Thank you, Justice MARKMAN. You are the only person this evening that lived within your time constraints. [Laughter.] On behalf of the Court and the Historical Society, I'm honored to accept this portrait. Before we adjourn, I want to thank the many people of the Supreme Court staff and security personnel who made this very special evening happen. In particular, let me thank a former member of the Supreme Court family, Lynn Seaks, who returned to the Court to help out. Thank you so much, Lynn. Court is now adjourned. We look forward to seeing everyone in the rotunda for the reception.



HONORABLE MARILYN KELLY

PRESENTATION OF THE PORTRAIT OF THE HONORABLE MARILYN KELLY

DECEMBER 5, 2022

CHIEF JUSTICE ELIZABETH T. CLEMENT: Well, good evening. Welcome to the Hall of Justice and the Michigan Supreme Court. I am honored to call to order this special session of the Court to unveil the portrait of Justice MARILYN KELLY. A special thank you to the Michigan Supreme Court Historical Society for their support of this event, as well as all the other work the Society does to honor and preserve the history of this great institution.

In addition to my colleagues on the bench, I believe we have several retired Justices here to join us in celebrating Justice KELLY. I see Justice MICHAEL CAVANAGH, Justice STEPHEN MARKMAN. Are there others? I thought we had more. All right. And I have word that we have a number of former clerks and staff that are here, some from as far away as Texas—Austin, Texas, I heard. That's wonderful.

So, welcome. Thank you for being here today. You can all read Justice KELLY's impressive bio and the awards and honors bestowed upon her. And I'm sure we're going to hear today from those close to her what she means to them, the legal profession, and the judicial branch.

Before we hear from our distinguished speakers, I want to take a moment to reflect on the impact Justice KELLY had on our Court. It's been almost 10 years since Justice KELLY retired from our Court, and a lot has changed in that time. Justice ZAHRA is the only remaining colleague of Justice KELLY still serving. Justice KELLY's successor, Justice BRIDGET MCCORMACK, who we'll be hearing from later, has announced her retirement from the Court, and her successor, Justice-appointee KYRA HARRIS BOLDEN, has joined us today to honor Justice KELLY. We figured out how to adjust during a pandemic to continue serving the public from a remote platform, and you can view oral arguments on our YouTube channel.

While the faces and names have changed, I would like to share the things that have remained the same since Justice KELLY retired. When Justice KELLY was elected Chief Justice, she focused on the improvements she could make. The Michigan Supreme Court also—as she said, the Michigan Supreme Court has the task of supervising the other courts in this state. We set the example for the rest of the judiciary and the lawyers in the state. And if we tell them they have to treat each other with dignity, and we aren't treating one another that way, we can hardly expect them to take the message very seriously.

Justice KELLY started the tradition of the Justices having lunch together with rules: no discussion of cases. It was a time for the Justices to spend getting to know one another better personally, nurturing relationships, and promoting civility. I am proud to say that we still honor this tradition, and we thank you for starting this.

Justice KELLY also took over as Chief Justice during a very difficult economic time and led the Court and

the State Bar in the Judicial Crossroads Task Force. This task force was the foundation for the work we are doing today with the Justice for All Commission; the Michigan Judicial Council; the Diversity, Equity, and Inclusion Commission; and countless other priorities of the Court. We are able to do all of this work because leaders before us paved the way, leaders like MARILYN KELLY, who was the fifth woman to serve on this Court and the fourth to serve as Chief Justice.

When Justice KELLY joined the Court in 1997, she became an integral part of the first female majority on the Court with Justice DOROTHY COMSTOCK RILEY, Justice PATRICIA BOYLE, and Justice BETTY WEAVER. And I'm proud to note that this current Court is the fourth female majority in history. Most importantly, without pioneers and pathbreakers like MARILYN KELLY, we would not be here. Her vision and commitment to access to diversity and to equity are only now being elevated as priorities in Michigan's justice system.

So, friends, we gather today to thank Justice KELLY and to honor her. With that, let's proceed with our program. First up is Jules Olsman. Welcome, Jules, president of Olsman MacKenzie and Wallace. And do I need to say more, friend? We'll turn it over to you to get started.

JULES OLSMAN: Very good, friend. I'm not used to—I don't know whether it feels right for me to turn my back—

CHIEF JUSTICE CLEMENT: Please do.

JUSTICE BRIAN K. ZAHRA: Some say it's your better side. [Laughter.]

JULES OLSMAN: [Laughter.] I know you would prefer that. [Laughter.] Well, good afternoon, everyone. May it please the Court. Honored guests, all of us who are

here this afternoon for this great day to dedicate the portrait of Justice MARILYN KELLY. It's a great personal honor for me to be here, as I've known Justice KELLY for many, many years—before she was Justice KELLY, before she was Judge KELLY, going back to about 1976 when she appeared in federal court. I believe she was with the Dykema firm at that time, and I was a free law clerk for Judge Paul Komives at the time. I still remember that day and how she treated everybody.

So, I'm also very glad that we're finally here after 10 years because now people can stop asking me what I did with the money that they gave to contribute to the portrait of Justice KELLY 10 years ago. [Laughter.] Well, it doesn't look too good. Anyway, I've always had a very strong sense of loyalty to Justice KELLY. And since she left the Court in 2012, every time I see her, I always greet her with the expression "Madam Chief Justice." And she always says, "But you know, Jules, I'm not on the Court anymore." I said, "I know, but I just like saying it; I like hearing it." [Laughter.]

So, I also want to express my appreciation to Justice KELLY, who, in 2010, was one of four Justices in this room who voted for my appointment to the State Bar Board of Commissioners, an event which occurred at the suggestion of our former State Bar President Brian Einhorn—thanks a lot—who's here, and also Justice CAVANAGH. At the time, it was a four-to-three vote. Two of the Justices wanted somebody else; one of the former Justices indicated he would vote for anybody but me. [Laughter.] So, I did not take it personally, and I've had that order framed. [Laughter.]

So, the question for anyone who serves on this Court, for those of us who have been privileged to practice in front of this Court, and for the citizens of this state is: what exactly makes a great Justice? And

I think that Justice MCCORMACK, a few years ago, in an interview—I believe it was with Devin Scillian—was asked that question, and her response was: "A great Justice is someone who is not afraid to lose their job." This speaks to the person having great courage to stand up and do what's right, no matter what. And MARILYN KELLY—Justice KELLY—was always that kind of a Justice.

Another important quality of a great Justice is the ability to lead others, as Justice Ginsburg stated when she was describing leadership as "fighting for the things that you care about but doing it in a way that will lead others to join you." And I think that those qualities, too, are qualities that Justice KELLY has and had when she was on the Court.

As many of you in this room know, Justice KELLY was a very close personal friend of Judge Avern Cohn, who passed away this past February. Judge Cohn, with whom I was also very close, believed very strongly in the importance of collegiality among judges. In fact, when this building was built, he thought it was terrific, and when he heard that a lot of judges were choosing to work remotely, he thought that was a terrible idea. And he thought people ought to be together in the building so they could get together for lunch, talk with one another, and get to know one another.

There were many times over the years, as those of you know who knew Judge Cohn, that he was—he used the power of the letter to the editor and other forms to criticize the direction of this Court. And he absolutely bristled at what he regarded as unnecessary and intemperate discord among the Justices that, from time to time, would spill into the Court's opinions. This was an anathema to Judge Cohn, who personally described the judges on the court in the Eastern

District of Michigan as members of his judicial family. So that's the way Judge Cohn regarded his colleagues, and I think that's what he would—he expected—would occur here in the Michigan Supreme Court.

And I believe that Justice KELLY, when she was a colleague, a Justice on the Court, and as Chief Judge, did everything she could to promote civility and a good relationship among her colleagues, recognizing that these two words that we hear so much about—civility and collegiality—are not just mere expressions, nor are they just lofty goals. She understood that they were critical to the functionality of the Court. The Court cannot function as a house divided or as a house appearing to be divided.

When Justice KELLY won election to the Supreme Court in 1996 after having served on the Michigan Court of Appeals, she succeeded Justice CHARLES LEVIN. Justice KELLY's successor in 2012 was Justice MCCORMACK, and I think everyone in this room today recognizes that Justice MCCORMACK was a truly outstanding and transformational Justice and Chief Justice of the Michigan Supreme Court. [Applause.]

JUSTICE MCCORMACK: Well, thank you, Jules. Focus on Marilyn.

JULES OLSMAN: I know. This is for you. So—and after leaving the Court, Justice KELLY originally became a—I believe the title is—Distinguished Jurist in Residence at Wayne State's law school. I don't think that's a title that I'll ever be afforded. But she must have missed electoral politics, so she ran in one election to the Wayne State University Board of Governors, where she has served and continues to serve with distinction, having just won reelection again in another race this past November.

So the dedication of Justice KELLY's portrait today commemorates the consequential tenure on the Michigan Supreme Court of this most courteous and accomplished jurist, and I'm privileged to be here today with my wife, Barbara, and all of you many friends to congratulate Justice KELLY on this great honor and wish her well in all of her ongoing and future endeavors. Thank you. [Applause.]

CHIEF JUSTICE CLEMENT: Thank you, Mr. Olsman. Our next speaker has appeared in the courtroom many times. Co-chair of Honigman's appellate advocacy practice, Robert Riley was recently honored as a fellow of the Michigan State Bar Foundation. Mr. Riley.

ROBERT RILEY: Good evening, Madam Chief Justice, Justices of the Court. It's a privilege to be here tonight honoring Justice KELLY. Jules stole my joke about keeping my back to the Court. [Laughter.] When Justice KELLY asked if I would be interested in speaking tonight, I knew I had some homework to do. Portrait investitures are a solemn occasion, and to properly honor Justice KELLY, who served 16 years as Justice and Chief Justice of this Court, I knew the atmosphere would have to match the moment of the occasion.

So, like the slightly above-average law clerk that I was, I dusted off the Michigan Reports to read transcripts of other Justices' portrait investitures. I talked to my peer law clerks to see if they had thoughts on important topics to cover. And for the technologically challenged with us tonight—sorry, Mom and Dad—there's this website called YouTube, where the Court posts videos of its proceedings. So I watched a few of those, too. Come to find out in my YouTube research, not quite three weeks ago, the Court sanctioned a very different type of portrait investiture—as Justice ZAHRA called it, the MARKMAN bar mitzvah. [Laughter.]

Well, not to be outdone, Justice KELLY, your investiture is a different kind of party to commemorate the exact number of years you sat on this Court. I'm thrilled to announce that tonight is your sweet 16. [Laughter.] Justice MCCORMACK even told me that in her last act as Chief Justice, she got you a car. [Laughter.]

Serving as a law clerk is a good job. Serving as a law clerk to a Supreme Court Justice is a great job. And serving as a law clerk to Justice KELLY was the best job in the world. Sure, there are obvious reasons clerkships are highly coveted. You get to work hand in hand with a judge; you have a mentor to teach you how to think about the law; your writing improves exponentially, or so I thought; you have a springboard to a future job of choice. Everyone's familiar with those benefits.

But what those who never had the privilege of working for Justice KELLY missed, in addition to the obvious, was becoming part of her family. From 2008 on, I learned exactly what that meant. In one sense, it was learning about the things most important to her: the integrity and legacy of the Court, a commitment to excellence, a commitment to civility, and ensuring those less fortunate have access to the same legal system used and often abused by those with the financial means to do so. There was no leaving Justice KELLY's chambers after a stint as a law clerk without understanding that access to justice is critical for a functioning society. Thankfully, she equipped all of us with the necessary tools and spirit to continue that quest in our post-clerkship days.

In terms of her work at the Court, Justice KELLY gave everything she had to finding the right outcome for every single case. As you likely know, the Court

receives roughly 2,000 applications for leave to appeal in a given year. Justice KELLY was intent on reviewing each and every one of them because she knew that a criminal defendant's last appellate filings were just as important as headline-grabbing civil disputes.

Were it not for her tireless efforts, wrongly convicted people would still be sitting in jail, Michigan law would be less fair, and—who's kidding—there would be far fewer dissents that will forever memorialize her colleague's mistakes. [Laughter.] But it mattered not that she often found herself in the minority. She remained steadfast in her commitment to get things right. And much to her credit and, dare I say, stubbornness, she frequently convinced her colleagues to change their mind and see things her way.

In another sense, though, becoming part of Justice KELLY's family meant giving her insight into our lives, too. She cared far more about us as people than as mere clerks who helped manage the Court's business. Our personal interests were daily lunchtime topics. We spent hours discussing our families as we crisscrossed the state to hear oral arguments, attend bar functions, and the numerous award banquets at which she was honored. She always brought us, and for those of us with kids, gifts from her worldly adventures. And for some, myself included, she played the far more important role of wedding officiant.

Justice KELLY's interest in the lives of her clerks is perhaps best evidenced, though, by the turnout here tonight. As much as we are proud of her, I know she's equally proud of the clerk family tree that blossomed over the course of her career. It's amazing, indeed, to think about the breadth and depth of the limbs of that tree. Justice KELLY's clerks, interns, and staff have gone on to have remarkable careers of their own in

large part because of the lessons, values, and mentoring they received from Justice KELLY.

To put in perspective the reach of her impact, Justice KELLY's staff has carried her torch in the State Appellate Defender's Office, local prosecutors' offices, as clerks to other Supreme Court Justices, as the current Supreme Court's Reporter of Decisions, as philanthropists, as judges of their own, and as attorneys who follow her lead in donating their time to access to justice. Suffice it to say, she's made a lasting impact on all of us who share her passion for making the legal world a better place.

Our speakers today have rightly focused on Justice KELLY's relentless work ethic, countless successes, accomplishments, and awards as a public servant. Not to throw cold water on a positive vibe, but I think we need to recognize one aspect of life that you've failed at: retirement. [Laughter.] In 2012, our agist state Constitution prevented Justice KELLY from running for a third term as Justice. Rather than take the hint or the opportunity to spend well-earned time for herself, she doubled down on public service.

In fact, she apparently so missed the campaign trail that, as Jules mentioned, she had twice successfully ran for Wayne State University's Board of Governors. As if that weren't enough, she teaches an access-to-justice course at Wayne Law, sits on the Wayne Law Board of Visitors, serves on the board for the Michigan Leader Dogs for the Blind, and remains active in her church. Some might say that her tenure on the Court was a mere warm-up act for her countless current activities, all of which only add to her legacy as a thankless leader committed to improving the lives of others.

When I asked Justice KELLY to officiate my wedding, I told her that it was absolutely critical that we finished the ceremony in 20 minutes or less. The payback was tough. She gave me a mere six to eight minutes to talk about her tonight. She knows well that her tenure on the Court, as seen through the eyes of one law clerk, can't be boiled down to an hour or two, let alone six to eight minutes. But that's just Justice KELLY being Justice KELLY, always preventing the spotlight from focusing on her for too long.

Justice KELLY, when you see your portrait hanging in the Hall of Justice, I hope you share the same sense of pride the rest of us will, knowing the great service you provided to the Court, the attorneys who appeared before you, and the parties who—win or draw—benefited from your intellect. And on behalf of your law clerk family, who knows better than anyone just how hard you worked and how much you cared about the Court's service to the public, we can't thank you enough for having had the opportunity to work at your side. Congratulations on this wonderful occasion. [Applause.]

CHIEF JUSTICE CLEMENT: Thank you, Mr. Riley. Our next speaker worked closely with Justice KELLY in her leadership role as the Executive Director of the Michigan State Bar Foundation. Known for her work opening doors and finding resources to support access to justice has been truly transformative, and Linda and Marilyn were great partners in this effort. Colleagues, please welcome Linda Rexer. [Applause.]

LINDA REXER: Thank you, Chief Justice CLEMENT, Justices of the Court, Justice KELLY, all of you here. So nice to see old friends and familiar faces. And as much as I like all of you and miss all of you, there's very little that could have pulled me out of retirement, but this is

it. I'm honored to add a few words to the occasion because we are all appropriately acknowledging Justice KELLY's legacy to our justice system. And as I mentioned, I'm retired—not quite flunking it as badly as Marilyn yet, but I'm working on it. She's always been a model to so many of us [laughter], so you're all in trouble.

So—but I was the Executive Director of the Michigan State Bar Foundation. I had the privilege of working on the Foundation's mission to advance access to justice for those in need for 30 years. And as part of that work and since, I've also worked very closely with Justice KELLY on her access-to-justice efforts, and that's what I'd like to talk about.

I saw firsthand many of her efforts to advance access to justice for low-income persons and for others who have barriers to solving legal problems. And these problems can be quite serious for the poor. They can be things like losing your home, losing your kids, losing your job, and Justice KELLY never forgot the human being at the end of this chain.

And I see Justice [MICHAEL] CAVANAGH here and remember often his quote when he thanked Justice KELLY at her retirement party, quoting, I think, G. K. Chesterton, which impressed me right there, but he was—the quote was about how she never failed to see the prisoner in the dock. And so, it's not just I who—who have noticed that. By the way, Rob knows this, that retirement "do" was the only—the only one she would accept was a retirement party that was a fundraiser to establish the Justice—the MARILYN KELLY public-interest scholarship at Wayne Law. So, that tells you a lot right there, too.

But, anyway, there isn't time to tell you, of course, all the—all the stories about access-to-justice work

that we did. I have many memories, and they certainly were highlights in my career. But I want to tell you a couple that, I think, were game-changing. As Chief Justice in 2010, Justice—Chief Justice KELLY established these solutions on self-help task force: the SOS Task Force, one of the better—listen up, everybody, you got to have a good name for your committees, and that was pretty good.

And I was privileged to be appointed as co-chair to lead that 100-plus member group, and they had—we had lawyers and librarians and legislators and legal aid and bar and court representatives, the kind of collaboration that Justice KELLY always encouraged. She charged the SOS Task Force with proposing effective strategies to assist the self-represented in our state. And unlike some groups I've been on, she didn't just go away. She was a working member at every committee meeting for a year and otherwise used the bully pulpit to advance the project.

So, as we all know, the SOS Task Force resulted in the creation of the Michigan Legal Help Program, which is a national—nationally award-winning program to help self-represented folks who are—need to solve their civil legal cases. But I'd also point out that the partnerships that Justice KELLY established when she—at that time that she facilitated, they continue, which is another message in itself. The people who continue to support Michigan Legal Help and to help it grow as a real cornerstone of how we do justice in Michigan included the State Court Administrative Office, the Court, legal aid, Justice for All Commission now, the bar, the bar foundation, and others.

And so that—that tells you how a legacy gets started but that [is] also sustained because now, these many years since, Michigan Legal Help supports more than

20 local self-help centers around the state, and its user-friendly website helps, now, I think, about 23,000 self-represented persons per week. So that was one of the game changers.

I would also like to give you just a couple of examples of how Justice KELLY encouraged judicial leadership in herself and in others, but one was that as Chief Justice, she established the position—staff position—in the Office of the Chief Justice of Director of Access and Fairness, one of few in the country that put that position at that level for those purposes. And it not only made clear that—that the courts have a role in access, but it facilitated action toward that end. So just one example: she distributed a judge's pro bono tool kit to all—I think, at the time, 600 or more judges in the state—to give them some concrete tools and more than a little bit of a nudge to kind of ethically encourage and facilitate pro bono cases where—in which lawyers are providing free legal services to the indigent.

A second example, which really was known beyond Michigan, is her 2010 State of the Judiciary speech, which she gave to a joint session of the Michigan Legislature, the first such address in a decade. That speech focused, in large part, on our state's access-to-justice needs and programs. And that speech raised the bar for access to justice in our state, and it was posted, I know personally, on more than one national access-to-justice website as an example to judges everywhere of judicial leadership in access to justice.

And one of the emerging ideas—this is another good example, I think, from that speech. At the time, it was an emerging idea that could help make more legal services available to the poor—was limited-scope representation. And that was the beginning.

And fast-forward to now—to the limited-scope-representation rule that the Court has since adopted, which now means that more lawyers are able to provide free legal help to the poor because, instead of having to take the whole case, a pro bono lawyer can help with a discrete part of it, a discrete aspect of it, where an indigent person is able to handle the rest of the matter most likely with the resources of Michigan Legal Help. Another game changer there.

So, you can imagine how many other examples there are that I don't have time to mention. But I do want to add to the note in today's printed program that just—and, as Rob mentioned, that Justice KELLY is currently Distinguished Jurist in Residence at Wayne State Law—I want to add a note to that. What I want you to know is that after she left the Court 10 years ago, she used that position to teach an access-to-justice seminar, which Rob mentioned, but what I want to tell you is every semester since she's left the Court—at Wayne Law [she] teach[es] that seminar.

So not only did she lend the weight of her reputation to elevating that topic—the topic of access to justice—on the curriculum, and at that fine law school now there are countless, countless students—I can see one whom I know in the back of the room—who from her decades of classes, and from treating access to justice as a serious field of endeavor, that they are now bringing their deep knowledge into their legal careers, which who knows where that will end? It's just blossoming.

And last, I want to say that, in preparing these remarks, I was struck by the through line between Justice KELLY's judicial leadership for access to justice and the exciting current work of this Court and its partners through the Justice for All Commission. Some

of the genius of both your work and Justice KELLY's is enlisting a wide range of people from inside and outside the justice system—those who know about the impact of all that we do—to work together to encourage innovation and collaboration and a real long-term commitment to finding solutions together.

So, I know that I'm not alone in thinking that Justice KELLY's past access-to-justice work can be counted as part of what helped position this Court, many of you, and others to make even more strides in access to justice today. Nor am I alone in expressing deep admiration and thanks to Justice KELLY for that very important legacy. Thank you. [Applause.]

CHIEF JUSTICE CLEMENT: Thank you, Ms. Rexer. Our next speaker doesn't really need an introduction. Justice MCCORMACK—BRIDGET MCCORMACK, who has followed in Justice KELLY's footsteps in so many ways. One way she's promised us that she wouldn't is by waiting 10 years for her portrait. She promises [laughter] that when she leaves—

JUSTICE MCCORMACK: No such promise was made.

CHIEF JUSTICE CLEMENT: She promised that it would be done much sooner than that. So, Justice MCCORMACK.

JUSTICE MCCORMACK: Thank you, Chief. It is an honor for me to get to speak at this occasion. Justice KELLY has been a mentor, and she's been a friend, and she's someone who I admire deeply. And, so, it is really an honor. I filled Justice KELLY's seat and tried to fill her shoes, but the impact that she's had on the justice system in Michigan by her jurisprudence, by her leadership on access to justice, and by her civility turned out to be very large shoes. I'm not sure anybody could fill them.

Before I knew Justice KELLY personally, I knew her work. Specifically, by that I mean her opinions. I was on the faculty at the University of Michigan Law School before I was elected to the Court, and I had a regular appellate practice and sometimes appeared in this Court.

The first time I appeared in this Court—there's no reason you will remember this particular case, Justice KELLY—but it's *Jones versus Department of Corrections*. I was supervising two law students. One of them is here today—John Fedynsky. He wrote an excellent brief. We should have won. [Laughter.] We lost five to two. But you were right. [Laughter.] And John will confirm that, I'm sure. I actually—

UNIDENTIFIED ATTENDEE: [Indiscernible].

JUSTICE MCCORMACK: [Laughter.] There you go. The student-practice rule did not permit students to argue, and still does not in the Supreme Court, so I had to argue the case even though the students had written a fantastic brief and could have, in my—in my view, done a terrific argument. And at the end of the argument, Justice YOUNG told me I had done a great job for a student. [Laughter.] And I thought, like, thank you—I'll take it as a compliment, actually. He didn't know. I said, "I'm actually not the student." I explained. He said, "Well, why wouldn't you let the student do it?" I said, "I would let the student do it, but you wouldn't." So, I—so I appreciated the dissent in that case, Justice KELLY.

But there are other opinions of yours that I followed and read, some of which—dissenting opinions—later became the law. And a couple are worth mentioning. For example, your dissenting opinion in *People versus Slaughter* from 2011, where you would have held that the community-caretaking exception to the Fourth

Amendment warrant requirement cannot justify a warrantless entry into a private residence. Ten years later, the United States Supreme Court unanimously agreed with your position, and that is now the law of the land.

And your dissenting statement in *People versus Rose* in 2010. You wanted the Court to reconsider the use of acquitted conduct at sentencing. The Court did that—this Court did that—in 2019, and your position is now the rule of law in this state.

And—and your majority opinion in *People versus Grissom* in 2012, overruling cases that imposed a per se prohibition against granting a new trial based on newly discovered impeachment evidence, was a really important doctrinal advance for addressing wrongful conviction. I was, at that time, teaching in a non-DNA innocence clinic at the University of Michigan Law School, and it was a celebrated opinion because it was going to provide more access to more people who had claims of wrongful conviction. It had a tremendous impact.

Anyone who's heard me talk about anything in the last few years has probably heard my pants-on-fire rant about the sheer scope of the problem of people navigating legal problems without lawyers—something that we've already heard, in great detail, how much foundational work you did to put us in a good position to address that crisis. I often say it's not a problem just for those individuals; it's a problem for the rule of law because, if 70% of our neighbors, which is the number now, have to navigate their civil-justice problems without the help of a lawyer, they're going to start to believe that the system is not fair.

And when that many people believe the system is not fair, the rule of law is threatened. It's a national

problem; it's not—Michigan's not special. But your attention to figuring out how Michigan could innovate to solve this problem within our borders built a foundation on which there is really now exciting work that, I believe, is making and will make Michigan a national leader in addressing access to justice.

And I should—and I always want to make clear that thousands of Justice ZAHRA's hours later, the Justice for All Commission has made a tremendous difference in the way it's approaching that. But without your foundational work, Justice KELLY, with the Crossroads Task Force and then with establishing Michigan Legal Help, I don't think we would have been in the position to build what we have built in the last few years.

And I now believe Michigan Legal Help is clearly the best self-help website in the country. It was—it imagined with big goals, and it's achieved them. It's given millions of people access to high-quality legal information—26 self-help centers throughout the state, and more coming—and built dozens of do-it-yourself tool kits to guide people through legal processes.

In 2013, it optimized for mobile, so people could use it on their smartphone, which is the way most people are looking to get legal information and answers. In 2014, they launched "Ayuda Legal" so that people who were Spanish speakers could get information and help in their own language. And in 2017, they launched an incredible tool that helps diagnose the kind of legal assistance one would need and then triage for that.

It's just grown and become stronger and become a more important and innovative tool to address the access-to-justice crisis in our state. And that strong foundation put us in this really excellent position when we sought grant funding to run a Justice for All

strategic-planning process in 2019. That process has produced a comprehensive and innovative plan to make Michigan a national leader in access to civil justice, and the Justice for All Commission has been tackling elements of that plan for almost a year.

I think every one of my colleagues puts in some time on some—one of its many subcommittees or working groups, but as I said, Justice ZAHRA has taken this on from the beginning and put in literally thousands of hours. There is a lot to be proud of, but we have to thank you for that foundation. It's built on your work. That's why we are where we are.

I finally want to say one more thing about my—the first time I met Justice KELLY in person. It was in her office in 2012 in Detroit. I had asked to meet with her to ask for her support in my campaign to—to sit on this Court. I—some of you know this—I had not received a warm welcome by everyone in the world when I started running for this office. There were some—probably understandable—concerns that my work representing people convicted of crimes would make me unelectable, would make me a candidate who would not be one who could win, and might even cause more trouble for the—for the other candidates on the ticket.

And you'd think that might have been enough to convince Justice KELLY not to even meet with me. You could have imagined her saying, "I think I'm going to sit this one out, and we'll see how it goes." And that would have been completely fair. But that's not what happened. She warmly invited me to her chambers. She did not share those concerns, or if she did, she didn't let them influence her decision to support me.

She showed up for me in every way from that day forward and still has. I want to thank you for your integrity, for your kindness to me personally, and for

your tremendous and lasting impact on equal justice for all in Michigan. Thank you. [Applause.]

CHIEF JUSTICE CLEMENT: Thank you, Justice MCCORMACK. Now, we are all here for what we've all been waiting for—nationally renowned portrait painter, gallery artist, teacher, author, TV host, and the list goes on and on. Robert Maniscalco, welcome. [Applause.]

ROBERT MANISCALCO: Well, thank you, Justice CLEMENT and all—all of your fellow future possible portrait prospects. [Laughter.] May it please the Court. I always like that expression, "May it please the Court." It's particularly significant when it comes to talking about a portrait, and so truly, may it please the Court. Keep my fingers crossed, right?

It is a great honor to be here to present this portrait painted in 2008—it's under my signature—of the portrait of the great honorable "Doreen" Gray. Oh, I'm sorry. Dor—no, that's—get my joke? "Dor-een" Gray? [Laughter.] Okay, thank you. Not funny. All right, all right—I got more. Yeah—jokes, artist jokes. Dad jokes, right? You haven't aged a bit, your Honor. We all know that, but I guess time flies when you're having fun. Sounds like you've had a lot of fun since I created your portrait if you enjoy doing a lot of great public service.

So, thank you for continuing your work, above and beyond. I highly encourage, however, those present to act sooner than later when it comes to having your portrait painted. And congratulations are in order to the Wayne State Board of Governors' reelected sitter, Scout—your dog, right. I did a little bit of research—not much. But these euphemisms, of course, refer to you, the inimitable Justice MARILYN KELLY. Come on down; it's your turn to play "The Portrait is Right." [Laughter.]

You may not know this, those of you here, that I was also the—we have some common connection with Wayne State, and I was the voice of Wayne State's marching band many years ago. I was also on the Board of Visitors, whatever that was, I don't—but as many of you know here, I have painted a number of portraits posthumously for the Court. I painted—[whispering] I paint dead people. [Laughter.] But I also paint live people, and I always prefer that. None of—the deadest of them all, of course, was the gentleman who greeted you as you walked in, AUGUSTUS WOODWARD, the first Justice of the Michigan Supreme Court, which, in case you were wondering, I most definitely painted posthumously. I'm not that old yet.

I certainly prefer to meet and to get a sense of the person that I paint in person. There is a connection that really must be made in person because long after we have left this Earth, our portraits will remain to carry on our legacy. And I'm very proud to—as my late, great portraitist father, Joseph Maniscalco, like to put it—hang together in the Halls of Justice. Hang together in the Halls of Justice. He used to like saying that—we hang together in the Halls of Justice.

I commend the ongoing mission—none of these jokes are going over, Betsy. [Laughter.] I commend the ongoing mission of the Michigan Supreme Court Historical Society, and I am very proud to have aided in the—in filling in several of the missing gaps of Justices over the years who have served on the Michigan Supreme Court. I believe now have—we now have portraits of every retired Justice, living and dead, of the Michigan Supreme Court. I'm not sure if that's exactly accurate.

I recall the great pleasure of creating this portrait of Justice KELLY. I like to keep it relaxed so I can get close to the soul of the person. I remember enjoying our time

together, sharing some great jokes in response to some hilarious comebacks, in response to endless array of witty quips in our brief time together—now so many years ago. In fact, it's been so long I can't remember a single one of them.

You know, it's often the case, though, that we sometimes forget what is said, but only the emotion remains —that feeling, that sense of the person—and that's maybe the best definition of a portrait I can think of. It is the distillation of emotions exuded by the subject—the essence, if you will. There are no words in a portrait—just a feeling for the person.

So, what I do remember of my time with Justice KELLY is here recorded in her portrait. No guile, no veil I had to penetrate, no BS to cut through to get to her soul. She struck me as a straight arrow in possession of a profound genuineness and conviviality. And I hope I captured those singular qualities in my portrait of you. So, it is without further ado that I present to you my portrait of Justice MARILYN KELLY. [Applause.] [Portrait of Justice MARILYN KELLY is revealed.] [Applause.]

CHIEF JUSTICE CLEMENT: Thank you so much. Justice KELLY.

JUSTICE MARILYN KELLY: Chief Justice CLEMENT, members of the Court, it's a pleasure to be with you today. I feel awkward, also, turning my back to you. I'm touched by the remarks of my speakers. I obviously—very thoughtful, kind, and generous remarks. Although, I must say, I scarcely recognize myself at times in the course of it all. And I want to thank all of you for being here today.

As you well know, the purpose of this get-together is to formally present my portrait to the Court. But just as important to me is the opportunity that it affords me to render thanks. My friends and supporters have

survived my running nine times for public office, seven times statewide, five times for a court seat. A great number of these people have been lawyers, like Jules Olsman. Jules raised the funds that made possible that portrait and the celebration we're going to have after, and I much appreciate it, Jules. I appreciate Jules and the others who've been so supportive of me. He believed in me. Other lawyers here today have believed and supported me, both morally and financially, over the years and over my many campaigns, and I appreciate them.

One of my biggest rewards during the years on the bench was working with bright, productive, energetic young people—lawyers—gifted individuals with bright futures: my law clerks. So, my hat's off to them. Robert Riley, obviously, was among them and a joy to work with, Robert. Many others are here today: David Arnold, Lisa Berden, Sean Crotty, Dean Googasian, Todd Holleman, Matt Klakulak, Joshua Lee, Kathryn Loomis, Dan McCarthy, John Postulka, and Michael Steinberg. I bet you didn't know Michael Steinberg worked with me on the Court of Appeals. He's had an illustrious career since.

Also, of course, there were many interns—judicial interns—young law students who were on their way to becoming members of the bar, and many of them here—are here also. And I may miss some in both of these recitations, so forgive me. But we have George Rendziperis. We have Heather Cummings, Shawn Jappaya, Brian Jaye, Lana Panagoulia, Barbara Shutler, Cindy Reach, Kimberly Scott, Andrea Tawil, and Rick Yeh.

You know Justices of the Supreme Court rely heavily on our commissioners—highly competent lawyers like Fred Baker and Gary Chambon—and, in the Court of

Appeals, our prehearing attorneys. And I remember with admiration the work of Mark Armitage.

As with all Justices, I've been indebted to my secretarial staff, like Carol Lentz, who gave me superb service for several decades, both on the Court of Appeals and on the Supreme Court. And my thanks to the many administrative staff members who've served me and served Justices here today. An excellent example is Lynn Seaks, who came back from retirement with the Court to organize this entire program, thank heavens. My thanks to her. My thanks to all our hard-working administrative staff.

This brings me to Linda Rexer. When she spoke, you heard Linda describe my contributions to access to justice, and that work clearly has become a sizable part of my legacy. But I would be remiss if I were not to have the record reflect here and now that Linda is the genius behind every success I've had in access to justice, Michigan Legal Help, the judge's self-help kit, my access remarks to the Legislature, even the design of the course that I'm teaching at Wayne State University. Linda did the unremitting work and then turned it over to me and let me take credit for it. Now, you must agree that one does not encounter many people in one's life who are willing and able to do that. I cannot thank Linda enough. [Applause.]

So, I left the Court—I left, as you heard, in 2013, I sometimes say kicking and screaming. I was aged out, and from my point of view, one of the only positives about leaving was the satisfaction that the person who succeeded to my seat on the Court, BRIDGET MCCORMACK, is so very gifted and that the Court has thrived so admirably under her leadership.

JUSTICE MCCORMACK: Thank you.

JUSTICE KELLY: Thank you. [Applause.] So, today, it's fitting for me to look a little back over these 10 years and reflect on how the Court has evolved. It is much improved. I applaud you, the Justices of the Court of 2022, for your forward-looking policies, for having taken in hand the leadership of the third branch of government, for having made much-needed improvements in the legal system, such as through your access-to-justice initiatives. I congratulate you for your camaraderie that you've developed, especially during the trying times imposed by COVID and given the highly divisive issues you've recently resolved.

Occasionally, I'm asked what it is that I enjoyed most about my years as an appellate judge, and I answer, "I enjoyed making decisions." I used to marvel at the diversity and the complexity of the cases that come before the Court. Some quite literally showcased the workings of our government. Some revealed the very innards of commerce. And many provided a kaleidoscopic glimpse into the human condition itself.

While on the Court, I reveled in the challenge of trying to make good decisions on the cases that came before me, of working to get it right, and after that, of getting it down right. I took genuine pleasure in striving to write my opinions in easily understood plain English, leaving as little ambiguity as possible in the ever-present and ever-perplexing knowledge that language carries with it the inevitable baggage of ambiguity.

When I became Chief Justice, I found it fulfilling to have the opportunity to identify a vision for the Court and to work toward that vision, with the object of improving Michigan's justice system by addressing the flaws and the opportunities that existed to eradicate them. I attempted to guide the Supreme Court toward

becoming, as today it largely has succeeded in becoming, a more temperate, modulated, objective, and forward-looking body.

I enjoyed serving with Justice MARKMAN and Justice ZAHRA and particularly enjoyed the guidance and friendship of Justice MICHAEL CAVANAGH. During my 17 years as a legal practitioner, 25 years as an appellate judge, and 10 years as a teacher of law—please don't add those up—I had the blessings of a wealth of experiences. I had the opportunity to work with and observe many judges at every level of the judiciary, and I greatly admired many of them.

I put together a mental list of the qualities of a good judge. They include, of course, a high intellect, wisdom, the ability to inspire government leaders, fellow professionals, and lay people alike. When making the list, I came to realize that one can have all those qualities and yet be a failure as a judge if one lacks human compassion, a mature comprehension of human frailties, and an understanding that the mistakes that some people make that get them into court stem from societal faults and the hand that fate has dealt them. To be sure, a good judge must safeguard the system, protect the interests of the wealthy and the powerful, but at the same time, a good judge must have his/her/their eye on the sparrow; the interests of the weak and the underrepresented must be protected and their rights preserved.

Finally, I believe that one can be a giant in this profession but be a failure as a judge if one falls prey to the dreaded black-robe disease—that perverse and sometimes fatal form of blindness and insensitivity to others which is accompanied by a bloated sense of self-importance. Many judges I have encountered seem to be immune to this disease. To name a few, and only

a few: the Honorable JOHN SHEPHERD, LISA GLEICHER, HAROLD HOOD, MYRON WAHLS. When I wore the robe, I tried to remind myself with regularity that I bore the title "The Honorable" merely by virtue of the job and that actually being honorable did not come as a matter of course.

I tried to remember also that judges are held to a higher standard of conduct largely because of the systemic danger that threatens if they are not honorable members of the community. People look up to us, in part, because they have a need to believe in our integrity as judges. The system depends on our satisfying that need.

Well, these are my reflections. I won't go on. It's time to end this and also go down and have some good refreshments and fun. But let me close by saying that it was a privilege and an honor to sit as a judge of the Michigan Court of Appeals and of the Michigan Supreme Court. They were the opportunities of a lifetime, and I've been humbled and deeply grateful for them. In parting, once again I thank you for your part in making my years on the Court possible. [Applause.]

CHIEF JUSTICE CLEMENT: Thank you, Justice KELLY. And on behalf of the Michigan Supreme Court, we are so pleased to accept your portrait. At this time, I'm to direct guests to the first-floor conference room for a celebration of Justice KELLY and her portrait. Thank you, everyone. [Applause.]

SUPREME COURT CASES

PEOPLE v BECK

Docket Nos. 160668 and 160669. Argued on application for leave to appeal October 6, 2021. Decided July 27, 2022.

James Beck was convicted, following a jury trial, in the Macomb Circuit Court of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and three counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. In 2016, defendant was charged with two counts of CSC-II related to allegations that he sexually assaulted his minor daughter, TG, and the case proceeded to a jury trial. During the jury's deliberations, one of the jurors notified the trial court that another juror might have done outside research on the case. The trial court polled the jury by written note to find out whether any of the jurors were aware of that research. Two of the jurors responded affirmatively: Juror 255 stated that he had not researched the case itself, but had asked his mother about "her past experience" without mentioning the case. Juror 337 told the court that he had heard that one of the jurors was "looking into another [in]discretion" that had occurred in the juror's family. The court discussed this information with the parties, and the prosecution asked the court to replace the two jurors with alternates, while defendant preferred to allow the seated jury to continue its deliberations or to further question the two jurors to obtain more information. The trial court rejected the parties' requests and determined that the entire jury was tainted and declared a mistrial. The case was set for retrial in 2017. In 2017, while awaiting retrial, defendant was accused of sexually assaulting CS, the minor friend of one of his children, and was charged with two counts of CSC-I and one count of CSC-II. One of the CSC-I counts was charged as "person under 13, defendant 17 years of age or older" under MCL 750.520b(2)(b), which mandates a minimum sentence of 25 years in prison. The other CSC-I count in the information did not cite MCL 750.520b(2)(b) and stated only that the victim was "under 13," without also alleging that defendant was 17 years old or older. The 2016 charges and the 2017 charges were jointly tried in a second trial, and defendant was found guilty of all charges. The court sentenced defendant to 25 to 60 years in prison for each count of CSC-I and 57 to 180 months in prison for each count of

CSC-II. Defendant appealed, and the Court of Appeals, METER, P.J., and O'BRIEN and SWARTZLE, JJ., affirmed in an unpublished per curiam opinion. Defendant applied for leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other action, instructing the parties to address whether defendant's second trial was barred by the Double Jeopardy Clauses of the state or federal Constitutions and whether the trial court had improperly imposed a mandatory minimum sentence of 25 years for the count of CSC-I that was not charged as carrying this minimum sentence. 506 Mich 946 (2020).

In an opinion by Justice VIVIANO, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CLEMENT, the Supreme Court *held*:

The trial court did not conduct a sufficient inquiry to support a finding of manifest necessity before declaring a mistrial as to the 2016 charges; therefore, the court's declaration of a mistrial was an abuse of its discretion and the retrial on those charges violated double-jeopardy protections. Accordingly, defendant's convictions related to the 2016 charges had to be vacated. However, defendant was not entitled to a new trial, resentencing, or other relief regarding the 2017 charges. Contrary to defendant's contention that the remaining convictions were tainted by the admission of evidence related to the 2016 charges, his daughters' testimony would have been admissible other-acts evidence even if defendant had been tried separately on the 2017 charges. The trial court did commit plain error by imposing a mandatory minimum sentence of 25 years under MCL 750.520b(2)(b) for the second count of CSC-I charged in 2017, but resentencing was not necessary because the error did not affect the fundamental fairness of the trial.

1. Under both the state and federal Constitutions, an accused cannot be placed in jeopardy twice for the same offense. If a trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of manifest necessity. Determining whether manifest necessity exists requires balancing the competing concerns of the defendant's interest in completing the trial in a single proceeding before a particular tribunal and the strength of the justification for a mistrial. Before declaring a mistrial, the trial court must consider whether a mistrial is appropriate on the record and discuss alternatives with defense counsel and the prosecutor. When the trial court does not follow these procedures, there is no manifest necessity for declaring a mistrial. In this

case, the standard for declaring a mistrial was not satisfied. Although the trial court polled the jury and briefly discussed the matter with counsel, including each side's proposed alternatives, the court's consideration of the matter was too abrupt, and its conclusions were not supported by sufficient evidence. The nature of the juror's outside research was unclear to the court, but instead of further probing the juror's research and whether it would affect the proceedings, the court summarily declared a mistrial. Further, although the court learned when the jury was polled that only one other juror knew about the outside research, the court nonetheless concluded that the entire jury was tainted. The court did not find a justification for mistrial that outweighed defendant's interest in continuing the trial. Therefore, the court's inquiry was insufficient to find manifest necessity, and retrial on the 2016 charges violated the Double Jeopardy Clauses of the federal and state Constitutions.

2. Defendant argued that he was entitled to a new trial on the 2017 charges because his convictions on those counts were tainted by the admission of evidence related to the 2016 charges during the joint trial. At issue was whether the testimony of defendant's daughters and his ex-wife would have been inadmissible propensity evidence in a trial on only the 2017 charges. Propensity evidence is generally inadmissible under MRE 404(b)(1). However, MRE 404(b)(1) is superseded by MCL 768.27a when a criminal defendant is accused of committing a listed offense, including CSC-II and fourth-degree criminal sexual conduct (CSC-IV) against a minor. Under the statute, evidence that a defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. Therefore, evidence that defendant committed CSC-II or CSC-IV was admissible under MCL 768.27a(1). The pertinent question then was whether the challenged testimony qualified as evidence of CSC-II or CSC-IV. The 2016 victim's testimony that defendant touched her breasts and her genitals over her clothing when she was between 10 and 12 years old satisfied the elements of CSC-II, and defendant's other daughters' testimony also represented evidence that defendant committed CSC-II or CSC-IV; accordingly, the challenged evidence was admissible under MCL 768.27a(1). However, evidence that is admissible under MCL 768.27a must also comply with MRE 403. Under MRE 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Considerations under MRE 403 may include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infre-

quency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. When applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the probative value of the evidence rather than its prejudicial effect. In this case, the analysis would have weighed in favor of admitting the evidence. TG and defendant's other daughters alleged that defendant engaged in acts generally similar to those alleged by CS, many of the acts were temporally proximate, no intervening acts occurred, and there was a need for additional evidence to support CS's allegations. In sum, the probative value of the other-acts testimony was not outweighed by unfair prejudice. With regard to the testimony of defendant's ex-wife, defendant's arguments were made in conclusory fashion and the Court did not address them.

3. Under MCL 750.520b(2)(b), when CSC-I is committed by a person aged 17 years or older against a person under the age of 13, the offense carries a mandatory minimum sentence of 25 years. In this case, the trial court imposed a mandatory minimum sentence of 25 years for both of defendant's remaining convictions for CSC-I, despite the fact that the information only stated that one of the CSC-I charges carried that sentence. Under the Sixth Amendment, a criminal defendant has the right to be informed of the nature and cause of the accusation against them. A constitutionally sufficient charging document contains the elements of the offense charged and fairly informs the defendant of the charge against which the defendant must defend. The elements of an offense include those facts that increase both the ceiling and the floor of the punishment for an offense; this includes facts that increase the mandatory minimum sentence of an offense. In *Alleyne v United States*, 570 US 99 (2013), the Court held that if a statute prescribed a particular punishment to be inflicted on those who violated the statute under special circumstances mentioned in the statute, those special circumstances must be specified in the indictment. This requirement is meant to allow the defendant to predict the legally applicable penalty from the face of the indictment. Under MCL 750.520b(2)(b), the defendant must be 17 years of age or older for the 25-year mandatory minimum sentence to apply. Accordingly, this fact increases the minimum penalty of the crime and is therefore an element that must be charged. Because only one of the remaining CSC-I counts against defendant charged him as a person 17 years of age or older, the trial court's decision to apply the mandatory minimum to both counts was plainly in error. However, the error did not

significantly affect the fairness of the trial. Defendant had notice that he was over the age of 17 when he committed both counts of CSC-I; both counts arose out of defendant's actions on a particular date, so he was necessarily the same age when the conduct underlying both charges occurred; and the jury found beyond a reasonable doubt that defendant was over 17 years old at the time of the offenses. Additionally, the information's statement of the required ages of the victim and the offender as to the first count of CSC-I put defendant on notice that he would potentially be subjected to the same mandatory minimum for the second count. Therefore, this error did not entitle defendant to resentencing because it did not result in an unfair trial.

Convictions stemming from the 2016 charges vacated; convictions and sentences stemming from the 2017 charges affirmed.

Justice ZAHRA, concurring in part and dissenting in part, agreed that defendant was not entitled to relief related to the 2017 charges and convictions but disagreed with the majority's decision to vacate defendant's convictions relative to the 2016 charges and opined that the majority had failed to give adequate deference to the trial court's decision to declare a mistrial. Justice ZAHRA noted that manifest necessity is not to be interpreted literally or applied mechanically; rather, a high degree of necessity is required to justify declaring a mistrial. The level of appellate scrutiny properly applied to a trial court's decision depended on the nature of the circumstances that led to the mistrial declaration. In a case of possible jury bias, the decision of the trial judge was entitled to special respect, given the judge's opportunity to observe the sequence of events in the context of the trial. Under MCR 6.417, the trial court, before ordering a mistrial, must give the parties an opportunity to comment on the record on the propriety of the order, to state whether they consent or object, and to suggest alternatives. The role of the appellate court was not to determine whether it would have found manifest necessity, but whether the trial court abused its discretion. Justice ZAHRA opined that the trial court in this case did not abuse its discretion by declaring a mistrial. The record showed that the court complied with its obligation under the court rule and acted deliberately and responsibly in declaring a mistrial. Further, a review of the whole record demonstrated that extraneous information was brought into the jury room and created the possibility of juror bias sufficient to support a finding of manifest necessity to warrant a mistrial. Justice ZAHRA also was not convinced that the trial court had to extensively consider less drastic alternatives, noting that this was not required under either caselaw or the

court rules, and in any event, the trial court's consideration of the parties' proposed alternatives was adequate.

Justice CAVANAGH, joined by Justice WELCH, concurring in part and dissenting in part, agreed with the majority opinion that the trial court had abused its discretion in finding that a manifest necessity required a mistrial and that, consequently, defendant's second trial on the 2016 charges violated the prohibition against double jeopardy. However, Justice CAVANAGH would have remanded the case to the Court of Appeals to consider whether the 2017 convictions were impermissibly tainted by the introduction of the 2016 charges and additional other-acts evidence. Justice CAVANAGH also stated that the majority opinion had failed to faithfully conduct the analysis set forth in *People v Watkins*, 491 Mich 450 (2012), regarding whether evidence introduced pursuant to MCL 768.27a was admissible under MRE 403. Justice CAVANAGH noted that while *Watkins* required the courts to separately review each act alleged under MRE 403, the majority opinion lumped all the other-acts evidence together into one conclusory analysis and was therefore unclear as to whether some of the evidence admitted under MCL 768.27a should have been admitted under MRE 403.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — OUTSIDE RESEARCH — MISTRIAL — MANIFEST NECESSITY.

If a trial is concluded prematurely, a retrial for that offense is prohibited pursuant to double-jeopardy principles unless the defendant consented to the interruption or a mistrial was declared because of manifest necessity; in order to determine whether manifest necessity exists, a trial court must balance the defendant's interest in completing the trial in a single proceeding before a particular tribunal with the strength of the justification for a mistrial, and a mistrial may only be declared after consideration on the record and discussion of alternatives with counsel; when a court learns of outside research by a juror, the court should probe what the juror researched, how that research might affect the proceedings, the extent of any broader jury taint, and whether any taint was limited to jurors who can be excused and replaced.

2. DUE PROCESS — SENTENCING — MANDATORY MINIMUM SENTENCES — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — CHARGING DOCUMENTS.

Under the Sixth Amendment, a defendant has the right to be informed of the nature of the accusation; a constitutionally sufficient charging document contains the elements of the offense charged; the elements of the offense include those facts that

> increase a mandatory minimum sentence; MCL 750.520b(2)(b) prescribes a mandatory minimum sentence of 25 years for a conviction of first-degree criminal sexual conduct when the defendant is 17 years of age or older and the victim is less than 13 years of age; because the age of a defendant who is at least 17 years old increases the mandatory minimum sentence for a conviction of first-degree criminal sexual conduct, it is an element that must be charged.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Peter Lucido*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Emil Semaan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christine A. Pagac* and *Matthew Monahan*) for defendant.

VIVIANO, J. Defendant's first trial ended when the trial court declared a mistrial. While awaiting retrial, defendant was charged with additional crimes, which were tried jointly with his original charges in a second trial. Three issues are presented in this appeal. First, whether the retrial of defendant's original charges was barred by the Double Jeopardy Clause of the federal or state Constitution. See US Const, Am V; Const 1963, art 1, § 15. Second, if the retrial of the original charges was barred, whether vacating those convictions would entitle defendant to any relief with respect to his remaining convictions. Third, whether the trial court erred by imposing a mandatory minimum sentence of 25 years for defendant's conviction of first-degree criminal sexual conduct (CSC-I) when the information did not state that the charge carried this minimum sentence.

We hold that the trial court abused its discretion by declaring a mistrial in the initial trial without conducting an inquiry sufficient to support a finding of mani-

fest necessity. As a consequence, those convictions will be vacated. However, defendant has not demonstrated that he is entitled to a new trial, resentencing, or other relief regarding the other convictions. Finally, we hold that the trial court committed plain error by imposing a mandatory minimum sentence of 25 years under MCL 750.520b(2)(b) because the age requirement is an element that must be charged in the information and found by the jury, and it was not charged here. However, defendant is not entitled to relief because this error did not result in a fundamentally unfair trial.

I. FACTS

In 2016, defendant, James Beck, was charged with two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c, for allegedly rubbing his underage daughter TG's genitals and chest through her clothing while he was alone with her. At the end of the trial, the jury began to deliberate. However, during deliberations, a juror informed the judge that another juror may have done outside research on the case. The trial judge, concerned about juror bias, polled the jury by written note to see if any of the jurors knew of that research. All but two jurors responded in the negative. Juror 255 said he "didn't do any research on the case itself," but "[w]ithout mentioning anything about the case, I asked my mom about her past experience." Juror 337 said that what he had heard "was not about the case, but [that] a juror was looking into another discretion [sic] within his family."

The court then spoke to the parties about the issue. The prosecution wanted these two jurors replaced with alternates. Defendant, however, wanted the jury to either continue its deliberations or further questioning of Jurors 255 and 337 to obtain more information.

Defendant also argued that there was not enough information to show manifest necessity for a mistrial. The trial judge, however, expressed concern that the entire jury was tainted beyond repair because she did not know the subject of Juror 255's inquiry and speculated that the entire jury must know about it if Juror 337 had overheard something. Therefore, the trial court rejected the parties' requests and declared a mistrial. The case was set for retrial in 2017.

In 2017, while awaiting retrial on the original charges, defendant was accused of sexually penetrating one of his son's friends, CS, who was a minor. As a result, defendant was charged with two counts of CSC-I and one count of CSC-II. The first count of CSC-I resulting from this incident was charged as "Person Under 13, Defendant 17 years of age or older" under MCL 750.520b(2)(b), which mandates a minimum sentence of 25 years' imprisonment. However, the other CSC-I count only charged that the victim was "U[nder] 13" and did not allege that defendant was 17 years old or older or cite MCL 750.520b(2)(b).

The new charges and the original charges were jointly tried in a second trial. TG and CS both testified about their respective allegations. TG testified about three separate incidents. In 2013, she was sitting on the defendant's lap while he used the computer in his trailer. He opened her knees and rubbed her genital area through her sweatpants twice. She was 10 years old at the time. Sometime after, while defendant was throwing kids into a swimming pool, he reached his hands into her swimsuit when gripping her hips. And in 2015, when she was 12 years old, he asked her to sit on the couch with him when the other kids in the trailer were asleep. He tickled her, put his hands up her shirt, and touched her breasts.

CS, who is not related to the defendant, testified that in February 2017, when she was 12 years old, she went to the defendant's trailer to see his son, CB. The defendant gave CB a bottle of fireball whiskey for his birthday, and CS, CB, and other friends drank it and danced in CB's bedroom. While they were dancing, the defendant came in and started dancing with CS, putting his hands on her hips. When the other kids went for a walk, CS stayed behind, too drunk to walk. The defendant picked her up, took her to his bed, and pulled down her pants and underwear. He tried to penetrate her with his penis after she told him to stop. She vomited, ran to the bathroom, and continued vomiting into the toilet. While she was vomiting, the defendant attempted to penetrate her again.

In addition, over defendant's objection, three of defendant's other daughters and his ex-wife were permitted to testify about their interactions with defendant. One of his daughters, AR, testified that in 2007 when she was 15 and 16, defendant came into her room regularly to rub her back and touch her genitals. Another daughter, ANB, testified that defendant watched her and her friends change their clothing in 2014 when she was 16 years old; went into the bathroom while she showered in 2011 to 2013 when she was 13 to 15; and once rubbed her "inner upper thigh" and kissed her on the lips. Defendant's third daughter, ADB, testified that he slapped her on the buttocks and placed her toes in his mouth. Defendant's ex-wife testified that defendant treated the children in a cruel manner and sought custody only so that he could receive child-support payments.

At the conclusion of the second trial, the jury found defendant guilty of all counts. The court sentenced him to 25 to 60 years for each count of CSC-I, 57 to 180

months for each count of CSC-II, and ordered the CSC-II sentences to be served concurrently with the CSC-I sentences. Defendant appealed his convictions and sentences in the Court of Appeals, which affirmed them in an unpublished opinion. Defendant then sought leave to appeal in this Court. We granted oral argument on the application for leave to appeal with regard to the following issues:

> (1) whether the defendant's retrial in Docket No. 2016-000309-FH was barred by the Double Jeopardy Clauses of the federal or state constitutions, US Const, Am V; Const 1963, art 1, § 15; (2) if so, whether vacating his convictions in that case would also warrant a new trial, resentencing, or any other remedy in the jointly tried case, Docket No. 2017-001376-FC; and (3) whether the trial court improperly imposed a mandatory minimum sentence of 25 years for an act of first-degree criminal sexual conduct (Count II) that was not charged as carrying such a minimum. See *Alleyne v United States*, 570 US 99, 109-111[; 133 S Ct 2151; 186 L Ed 2d 314] (2013); *Apprendi v New Jersey*, 530 US 466, 476, 478-479[; 120 S Ct 2348; 147 L Ed 2d 435] (2000) . . . . [*People v Beck*, 506 Mich 946 (2020).]

II. ANALYSIS

A. DOUBLE JEOPARDY

The first issue is whether the retrial on defendant's original charges was barred by the Double Jeopardy Clauses of the federal and state Constitutions. See US Const, Am V; Const 1963, art 1, § 15.[1] "Under both the

[1] *Benton v Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969) ("[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment."). While we are not bound to interpret our Constitution consistently with similar provisions of the United States Constitution, "we have been persuaded in the past that interpretations of the Double

Michigan and the federal constitutions, an accused cannot be placed in jeopardy twice for the same offense." *People v Hicks*, 447 Mich 819, 826; 528 NW 2d 136 (1994), citing Const 1963, art 1, § 15; US Const, Am V. This protection attaches " 'once the defendant is put to trial before the trier of fact, whether [it] be a jury or a judge.' " *Hicks*, 447 Mich at 826, quoting *United States v Jorn*, 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971) (alteration in original). When the trier of fact is a jury, "jeopardy generally attaches at the time the jury is selected and sworn." *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). "If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity." *Id*. at 4. It is the prosecutor's "heavy" burden to show manifest necessity. *Arizona v Washington*, 434 US 497, 505; 98 S Ct 824; 54 L Ed 2d 717 (1978).

In deciding whether manifest necessity exists, the United States Supreme Court has stated:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for

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Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 15." *People v Smith*, 478 Mich 292, 302 n 7; 733 NW 2d 351 (2007). Therefore, our analysis is the same under each.

> very plain and obvious causes . . . ." [*Hicks*, 447 Mich at 828, quoting *United States v Perez*, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824).]

"Determining whether manifest necessity exists to justify the declaration of a mistrial requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification for a mistrial." *Hicks*, 447 Mich at 829. We have stated that "[a] mistrial may only be declared . . . after an on the record consideration and discussion of alternatives with counsel." *People v Benton*, 402 Mich 47, 65; 260 NW2d 77 (1977); see also MCR 6.417 ("Before ordering a mistrial, the court must, on the record, give each defendant and the prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.").[2] To declare a mistrial, the trial court must find the facts justifying the mistrial.[3] When such proce-

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[2] Although some of the federal caselaw cited in *Benton* has been overruled, this Court has never overruled *Benton* and no party has asked us to do so in the present case. See generally *People v Lett*, 466 Mich 206, 220, 221 n 13; 644 NW2d 743 (2002). In any event, even if consideration of alternatives is not constitutionally required, the trial court's failure to do so in the present case supports our conclusion that the trial court acted "precipitately" and without the "greatest caution" before declaring a mistrial. *Washington*, 434 US at 515; *Perez*, 9 Wheat at 580.

[3] *People v Parker*, 145 Mich 488, 500; 108 NW 999 (1906) ("Appellate courts will not interfere with the action of trial courts in discharging juries, where facts are found upon which such action can be based. But the facts must be found and placed upon the record."); *People v Anglin*, 6 Mich App 666, 674; 150 NW2d 532 (1967) ("In dealing with cases of alleged juror disqualification or misconduct discovered after the jury has been impaneled, our Supreme Court has pointed out that the trial judge who has conducted an investigation is better able to judge the question of disqualification because he 'saw and heard the juror and could note his appearance and attitude, tone of voice and manner of testifying

dures are not followed, there is no manifest necessity for declaring a mistrial. *Benton*, 402 Mich at 65.

"This Court accords considerable deference to a judge's determination of whether there is manifest necessity justifying declaration of a mistrial." *Id*. To ensure that the trial court properly exercised its discretion, the reviewing court must consider the "particular facts" of the case. *Hicks*, 447 Mich at 829. "[I]f a trial judge acts irrationally or irresponsibly, . . . his action cannot be condoned." *Arizona v Washington*, 434 US 497, 514; 98 S Ct 824; 54 L Ed 2d 717 (1978). See generally *Fulton v Moore*, 520 F3d 522, 529 (CA 6, 2008) (explaining that the court's review of "manifest necessity" focuses on "whether the trial judge (1) heard the opinions of the parties about the propriety of the mistrial; (2) considered the alternatives to a mistrial; and (3) acted deliberately, instead of abruptly"). The ultimate question is "not whether this Court would have found manifest necessity, but whether the trial court abused its discretion in finding manifest necessity." *People v Lett*, 466 Mich 206, 220; 644 NW2d 743 (2002) (emphasis omitted).

In this case, although the trial court may have believed it was acting with an abundance of caution, the standard for declaring a mistrial was not satisfied. The trial court did poll the jury by written note, go on the record with counsel to discuss the matter, and briefly consider each side's proposed alternatives to a mistrial. However, the court's consideration of the matter was too abrupt, and its conclusions were not supported by sufficient evidence. The nature of the juror's outside research was unclear to the trial court and yet, instead of further probing what the juror

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when undergoing the investigation.' "), quoting *People v Schepps*, 231 Mich 260, 270; 203 NW 882 (1925).

researched and whether it would affect the proceedings, the trial court summarily declared a mistrial. Cf. *Parker*, 145 Mich at 500. Further, despite learning through polling the jurors that only one other juror had knowledge of the outside research, the trial court concluded that the entire jury was tainted. Perhaps this would have been a reasonable conclusion had the trial court elicited information suggesting that the external research somehow affected the other jurors despite the poll results indicating the contrary. But on the record presented, there was no basis for disbelieving the jurors who responded to the written polling by stating that they did not know of the research. The trial court itself acknowledged that "we don't know if the conversation would influence for or against the defense or the prosecution" because "[w]e did not get enough information to even guess at that." Accordingly, the trial court's consideration of less drastic alternatives failed to sufficiently determine the extent of any jury taint and whether it was limited to jurors who could be excused and replaced. Due to these failures, the trial court did not adequately find a justification for mistrial that outweighed the defendant's interest in continuing the trial. *Hicks*, 447 Mich at 829.[4]

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[4] Justice ZAHRA's partial dissent speculates about what the jurors might have known and whether they understood what "outside research" actually meant. The result of these speculations is the tepid conclusion that there was a "possibility" of juror impropriety. The fact that Justice ZAHRA must guess about mere possibilities is, in large part, the problem with the trial court's handling of the mistrial: we are left to conjecture. Under the caselaw spelled out above, such guesswork does not afford an adequate basis for a finding of manifest necessity—instead, the trial court must find and place on the record the facts justifying its decision. See *Parker*, 145 Mich at 500.

Justice ZAHRA's partial dissent is also mistaken when it suggests that the United States Supreme Court has approved of this speculation in the context of juror bias. See *post* at 43-44 (ZAHRA, J., concurring in

For these reasons, the trial court's inquiry was insufficient to find manifest necessity, and therefore, retrial on the 2016 charges violated the Double Jeopardy Clauses of the federal and state Constitutions. Accordingly, we now vacate defendant's two CSC-II convictions that arose from the 2016 charges.

B. IMPACT ON THE 2017 CHARGES

Because we have found that retrial on the initial charges was barred, we must next determine whether vacating those convictions entitles defendant to a new trial, resentencing, or any other relief regarding his remaining convictions. Defendant claims that he is entitled to a new trial for the 2017 charges because his convictions on those counts were tainted by the admission of evidence during the joint trial relating to the 2016 charges during the joint trial, which would not have been admitted if the 2017 charges had been tried separately. In other words, had the 2017 trial only addressed the 2017 charges—as it should have, given

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part and dissenting in part), discussing *Washington* 434 US at 512-514. That case, and the case it cited, *Simmons v United States*, 142 US 148; 12 S Ct 171; 35 L Ed 968 (1891), are a far cry from the current matter. In *Washington*, the alleged bias resulted from the defense counsel's opening statement, which the trial court and all the jurors would have witnessed. *Washington*, 434 US at 498-499. The bias in *Simmons* arose from similarly public events. There, during trial, the prosecutor received an affidavit averring that a named juror knew defendant. *Simmons*, 142 US at 149. Defense counsel subsequently sent a letter denying the allegations and commenting upon them; that letter was then published in the newspapers. *Id*. After examining the jurors and determining that they had read the paper, the trial court found that the prejudicial information had been conveyed to the jury by way of the newspaper and that a new trial was necessary. *Id*. at 149-150. The Supreme Court upheld this sensible conclusion. *Id*. at 154-155. No such investigation or findings occurred here, nor was it even clear what potentially prejudicial information was researched by a single juror or how one other juror learned of it.

that double jeopardy should have barred retrial of the 2016 charges—the challenged evidence would not have been admissible.[5]

The evidence that defendant challenges includes: (1) the testimony of the complaining victim regarding the 2016 charges, (2) the testimony of defendant's three other daughters, and (3) the testimony of defendant's ex-wife. Generally, we review admission of evidence for abuse of discretion. *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014). Here, the question arises in a slightly different manner. While the evidence was admitted at the joint trial, the issue is whether the trial court would have abused its discretion if it had admitted this same evidence in a trial limited only to the 2017 charges. Further, we review the interpretation of a related statute de novo. *People v Watkins*, 491 Mich 450, 466-467; 818 NW2d 296 (2012).[6]

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[5] Defendant has similarly argued that the 2016 and 2017 charges should not have been joined in a single trial, regardless of the double-jeopardy violation, and that therefore the challenged evidence would not have been admissible in the trial of the 2017 charges. We did not order briefing on this issue and decline to address it now.

[6] Justice CAVANAGH's partial dissent faults us for treating this as an evidentiary error rather than addressing whether to characterize it as some other form of error. But neither she nor the parties have offered any legal analysis supporting another possible characterization of the error or the standard for addressing it. And no one has pointed to any authority suggesting that a properly tried charge is made reversible simply by being tried with a charge ultimately found to violate the Double Jeopardy Clause. The authority we have found suggests the opposite. The United States Court of Appeals for the Second Circuit, in *Pacelli v United States*, 588 F2d 360 (CA 2, 1978), addresses the issue most directly. Vincent Pacelli was convicted of conspiracy to distribute narcotics and two counts of distributing narcotics, but the conspiracy count was ultimately reversed on double-jeopardy grounds. *Id*. at 361. The court rejected a per se rule with regard to the impact of double jeopardy on the properly tried charges. *Id*. at 366. The court determined that presentation of the barred offense alongside the nonbarred offenses

Thus, we must determine whether the testimony of defendant's daughters and ex-wife would have been inadmissible propensity evidence if the charges had been tried separately. Propensity evidence—i.e., evidence admitted to show the defendant's propensity to commit the charged crime—is generally prohibited by MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportu-

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was harmless as to the latter because "the testimony of those government witnesses who testified with respect to the conspiracy count also related to the substantive counts, [meaning] the elimination of the conspiracy count would not have significantly altered the defense trial strategy . . . ." *Id*. at 366. Justice CAVANAGH notes that *Pacelli*, 588 F2d at 365, appears to support defendant's contention that if the present error were considered a constitutional error, the burden would be on the prosecution to prove its harmlessness beyond a reasonable doubt. But she fails to offer any explanation of how application of that standard would change the outcome here, and we do not believe that it would.

Similarly, in *Dowling v United States*, the United States Supreme Court considered use of acquitted conduct in a subsequent trial on other charges, treating the issue as an evidentiary question. *Dowling v United States*, 493 US 342; 110 S Ct 668; 107 L Ed 2d 708 (1990). The Supreme Court ultimately held that prosecutors could introduce evidence of an acquitted charge under FRE 404(b) when either (1) the issue being relitigated "is presented in a subsequent action governed by a lower standard of proof" or (2) the defendant "did not demonstrate that his acquittal in his first trial represented a jury determination" of the fact at issue in the subsequent action. *Id*. at 348-349, 350-351. Finally, we have indicated, outside the double-jeopardy context, that misjoinder is harmless when the evidence would have been admitted in the trial on the separate charge. See *People v Williams*, 483 Mich 226, 244; 769 NW2d 605 (2009) (" '[A] misjoinder may be deemed harmless only if all or substantially all of the evidence of one offense would be admissible in a separate trial of the other.' "), quoting *Byrd v United States*, 551 A2d 96, 99 (DC, 1988). In any event, given the lack of argument on this point and the evident lack of authority supporting the speculation in Justice CAVANAGH's partial dissent that some other framing applies here, we will treat the error as evidentiary for present purposes.

> nity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

However, MRE 404(b) has been superseded by MCL 768.27a when the latter applies. *Watkins*, 491 Mich at 476-477. That statute states, in relevant part, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a(1).[7]

CSC-II and fourth-degree criminal sexual conduct (CSC-IV) are both listed offenses when committed against a minor. MCL 28.722(t)(*x*), (v)(*v*), and (v)(*vi*). Thus, evidence that defendant committed these offenses is admissible under MCL 768.27a(1). The question, then, is whether the challenged testimony—specifically, the testimony by the complaining victim with regard to the 2016 charges and the testimony of defendant's other three daughters—qualifies as evidence of a CSC-II or CSC-IV offense. TG, the complaining victim in the 2016 charges, testified that her father touched her genitals through her clothes and touched her breasts. She was between 10 and 12 years old when the offenses occurred. These actions satisfy the elements of CSC-II, which is defined as including "sexual contact with another person" when "[t]hat other person is under 13 years of age" or "[t]hat other person is at

[7] Under MCL 768.27a(2)(a), " '[l]isted offense' means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722." "Listed offense" is defined by the Sex Offenders Registration Act as a "tier I, tier II, or tier III offense." MCL 28.722(i).

least 13 but less than 16 years of age and . . . [t]he actor is a member of the same household as the victim." MCL 750.520c(1)(a) and (b)(*i*).[8] MCL 768.27a permits evidence that a defendant is "accused of committing" a listed offense against a minor; it does not require a defendant to have been convicted of a listed offense. So, although defendant's convictions are being vacated for the charges stemming from the 2016 allegations, that victim's testimony would still have been admissible under MCL 768.27a even if there had been a separate trial on the 2017 allegations.[9]

This does not end the analysis because "MRE 403 applies to evidence admissible under MCL 768.27a." *Watkins*, 491 Mich at 486. That is, even if the evidence is admissible under MCL 768.27a, it must still comply with MRE 403. Under MRE 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unfair prejudice occurs " 'when there exists a danger that marginally probative evidence will be given undue or preemptive weight.' " *People v Mardlin*, 487 Mich 609, 627; 790

[8] " 'Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (*i*) [r]evenge[;] (*ii*) [t]o inflict humiliation[;] [or] (*iii*) [o]ut of anger." MCL 750.520a(q). "Intimate parts" is defined to "include[] the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(f).

[9] Because MCL 768.27a (1) permits evidence of crimes even though no conviction is obtained for those crimes, it applies to the allegations related to the 2016 charges even though the convictions based on those charges are being vacated.

NW2d 607 (2010), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "There are several considerations that may lead a court to exclude such evidence" under MRE 403:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Watkins*, 491 Mich at 487-488.]

"This list of considerations is meant to be illustrative rather than exhaustive." *Id*. at 488. However, "when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Id*. at 487.

Here, the factors weigh in favor of admitting the evidence. Although there were some dissimilarities between the allegations underlying the 2016 charges and those alleged in the 2017 charges, we conclude nevertheless that the probative value would not have been substantially outweighed by a risk of unfair prejudice by admitting this evidence. TG and CS were roughly the same age—TG was between 10 and 12 when the abuse occurred, and CS was 12. Defendant allegedly sexually abused both in his home. The only difference is that TG was defendant's daughter, whereas CS was not related to him. This difference is not enough to warrant exclusion under MRE 403.

Next, the allegations underlying the 2016 charges and the 2017 charges were temporally proximate. The incidents involving TG spanned from 2013 to 2015, while the incident involving CS took place in 2017. In

addition, the allegations underlying the 2016 charges did not involve infrequent acts, as TG testified about three separate incidents. See *People v Salloway*, 316 Mich App 174, 195; 891 NW2d 255 (2016) (finding that other acts were not infrequent because the abuse was not a "one-time occurrence"). There are no relevant intervening acts that would have cut against the admission of TG's testimony. While the defense attempted to undermine the reliability of TG's testimony, we conclude that it would have remained more probative than unfairly prejudicial notwithstanding the concerns raised.[10] In addition, we conclude there would have been a need for evidence beyond CS's testimony. No one witnessed the alleged abuse, and while CS did have a forensic examination that showed physical injuries consistent with sexual activity or abuse, that examination did not reveal the presence of defendant's DNA and there was testimony that CS was sexually active with another individual the night that the alleged abuse occurred.

In sum, TG's testimony concerning the 2016 charges shows defendant's propensity to sexually assault children left alone with him in his home and lent credibility to the accusations underlying the 2017 charges. Any risk of unfair prejudice is outweighed by the evidence's probative value.

Defendant also challenges the testimony of his other daughters, AR, ANB, and ADB, who testified that when they were under 17 years old, defendant touched their genitals, rubbed their inner thighs, and slapped them on their buttocks. Depending on the ages of the chil-

[10] Testimony was introduced at trial that TG asked others to testify that defendant had touched TG inappropriately or had touched them inappropriately. Nevertheless, her testimony was consistent with multiple other alleged victims.

dren and other attendant circumstances, these allegations would satisfy the elements of either CSC-II or CSC-IV. See MCL 750.520c(1)(a) (sexual contact with a person under 13) and (b) (sexual contact with a person at least 13 but less than 16 plus another aggravating factor such as when the victim is a member of the same household as the actor); MCL 750.520e(1)(a) (defining CSC-IV as including sexual contact with a person between 13 and 16 years old when the offender is five or more years older than the victim). Like the 2016 victim's testimony, defendant's other daughters' testimony represents evidence that defendant is accused of committing a listed act, so the analysis of these claims is the same. The testimony of defendant's other daughters as to these instances of abuse constituting listed offenses is evidence of the commission of "listed offenses" and thus is also admissible under MCL 768.27a(1).[11]

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[11] It is true that some of the testimony concerning the alleged incidents involved conduct that may not, by itself, constitute admissible evidence of the commission of a listed offense. Specifically, ANB testified that defendant watched her and her friends change, watched her as she showered, and kissed her on the lips. These acts do not appear to constitute listed offenses. ADB's testimony that defendant sucked on her toes also does not appear to allege a listed offense. Because these acts would not constitute listed offenses, the evidence would have been subject to MRE 404(b). See *Watkins*, 491 Mich at 494 (concluding that evidence that does not qualify as a listed offense must be analyzed under MRE 404(b)). According to MRE 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence can only come in for other purposes, such as "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." Whether this testimony would have been admissible under MRE 404(b) is doubtful, as it seems to have been admitted to show defendant's propensity to sexually abuse children. But even if this additional evidence would have been inadmissible in a case covering only the 2017 charges, it would not have been sufficiently prejudicial to affect the outcome of the trial and therefore its

We also conclude this evidence would have been admissible under MRE 403 for many of the same reasons that TG's testimony was admissible. All three daughters alleged acts similar to the crime charged regarding CS. Every allegation involved sexual abuse of minors in defendant's home. AR specifically alleged that defendant touched her genitals, as occurred with CS. With regard to ANB, the act alleged—rubbing her upper inner thigh—is similar to, though less egregious than, the charged crime relating to the abuse of CS. In that case, he touched CS in a similar location, her hips, before attempting penetration. ADB likewise alleged inappropriate touching less than penetration.[12]

With regard to temporal proximity, while AR's allegations occurred 10 years prior to the episode with CS, AR testified about ongoing abuse and there were no relevant intervening acts cutting against admissibility.

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admission would have been harmless error. The evidence against defendant was strong, especially in light of the admissible other-acts evidence.

[12] Justice CAVANAGH's partial dissent appears to suggest that by analyzing each of these allegations *in the same paragraph* we have somehow run afoul of *Watkins*'s requirement to "consider[] each act separately." *Watkins*, 491 Mich at 493; see *post* at 50 (CAVANAGH, J., concurring in part and dissenting in part) ("Yet when [these allegations from ANB and ADB are] presented in the same paragraph as analysis of the testimony of defendant's other daughter, AR, alleging that defendant touched her vagina with his hands and his mouth, the similarity or dissimilarity of *each* act becomes blurred."). We do not believe *Watkins* requires spatial separation—instead, it requires separate consideration of each of the other acts. While a lengthier analysis (with more spacing) is always possible, that does not necessarily mean its content will improve. Pascal, *The Provincial Letters of Blaise Pascal* (New York: Derby & Jackson, 1859), p 417 ("The present letter is a very long one, simply because I had no leisure to make it shorter."). On a separate note, we acknowledge that the allegations of ANB and ADB were not as extensive as the charged conduct, in that they did not involve penetration; but we also recognize that the charged conduct involved allegations of similar touching that occurred prior to the penetration.

ANB and ADB alleged conduct that appears to have been closer in time to the episode with CS.[13] Thus, although the earliest alleged conduct preceded the events of February 2017 by a number of years, much of the conduct was temporally proximate. AR testified to ongoing, frequent acts. Although ANB's and ADB's testimony spoke to isolated acts, the overall evidence revealed a pattern of other acts.[14] Even if ANB and ADB testified to acts that were individually less frequent, the testimony was still admissible. No intervening acts have been cited that would suggest the allegations are inadmissible under MRE 403. Finally, just as there would have been a need for TG's testimony, the same need applies to the other daughters'

[13] ANB said incidents of abuse occurred the entire time she was with defendant between the ages of 13 and 15. Because ANB was born June 1, 1995, this means the abuse would have occurred between June 1, 2008 and June 1, 2010. TG alleged three incidents of abuse. The first was in February 2013; she did not allege a time period for the second; and the third incident took place in 2015. ADB did not provide any dates, but she moved out of defendant's home at age 17, so any abuse likely happened before then.

[14] We disagree with Justice CAVANAGH's partial dissent that it is improper to consider whether the incidents comprising the other-acts evidence occurred in relation to one another. The *Watkins* factors—which are "illustrative rather than exhaustive"—expressly include the frequency of the other acts and are certainly broad enough to include consideration of the timeline of the other acts. The *Watkins* factors are considerations in the MRE 403 analysis, which generally weighs the probative value of the other-acts evidence against its potential prejudice. From this vantage, whether the other-acts evidence forms a pattern is relevant to determining its probativeness. See *United States v Wacker*, 72 F3d 1453, 1469 (CA 10, 1995) ("Applying this standard, we conclude that the proffered evidence is probative of a material issue and not unduly prejudicial. Although the bad acts testified to at trial occurred well before the offenses charged in the indictment, the prosecution used this testimony to show a long-standing pattern of drug activity from the late 1970s up until the time of appellants' arrest in 1990. Viewed in this light, the evidence is not unrelated and remote, but is integrally related to the criminal activity charged in the indictment.").

testimony—no one had witnessed the abuse of CS. As to reliability, defendant made no efforts to undermine ANB's or ADB's credibility. Although there was some evidence casting doubt on AR's credibility, her allegations were consistent with those of the other daughters. In sum, under the *Watkins* factors, the probative value of the evidence has not been substantially outweighed by the risk of unfair prejudice.

The last contested evidence is the testimony of defendant's ex-wife. MCL 768.27a does not apply to his ex-wife's testimony that he was rude and impatient with his daughters and wanted custody of them only so that he could receive child-support payments. Defendant's argument that this testimony was inadmissible under MRE 401 and MRE 404 has been made in conclusory fashion. "It is not enough for an appellant . . . simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims . . . and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Rather, defendant must provide this Court with authority to support his argument and demonstrate how the evidence is inadmissible under the rules he cited. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW 2d 856 (1984). Because he failed to provide such an argument, we need not address whether the trial court abused its discretion in admitting this evidence. See *id*.

Even though retrial of the 2016 charges was barred by double jeopardy and the related convictions will be vacated, defendant has not proven he is entitled to relief on his remaining convictions. The daughters' testimony would have been admitted even if defendant had been tried separately on the 2017 charges. And

defendant has not developed an argument that his ex-wife's testimony would have been held inadmissible in such a trial.

C. MANDATORY MINIMUM FOR CSC-I

The final issue is whether the trial court erred by imposing a mandatory minimum sentence of 25 years for a conviction of CSC-I when the charging document did not state that the charge carried that minimum sentence. A CSC-I offense committed by an individual 17 years old or older against an individual under the age of 13 carries a 25-year mandatory minimum sentence. MCL 750.520b(2)(b). The question presented is whether the information must allege the fact triggering the mandatory minimum for each count subject to that minimum. Defendant did not raise this issue at trial or in the Court of Appeals; therefore, we review the issue for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Plain error exists when "1) [an] error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. Even after these prongs are met, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.' " *Id*. at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Under the Sixth Amendment, a criminal defendant has the right "to be informed of the nature and cause of the accusation[.]" US Const, Am VI. A constitutionally sufficient charging document "contains the elements of the offense charged and fairly informs a defendant of

the charge against which he must defend . . . ." *United States v Resendiz-Ponce*, 549 US 102, 108; 127 S Ct 782; 166 L Ed 2d 591 (2007), quoting *Hamling v United States*, 418 US 87, 117; 94 S Ct 2887; 41 L Ed 2d 590 (1974). The United States Supreme Court's

> definition of 'elements' [of an offense] necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. . . . Facts that increase the mandatory minimum sentence are therefore elements . . . . [*Alleyne*, 570 US at 108.]

Put another way, a fact is an element when it "increases the punishment above what is otherwise legally prescribed" or "increase[s] the mandatory minimum sentence." *Id*.

This rule applied to jury findings in *Alleyne*, but it also applies to what must be charged in an indictment. *Id*. at 112. The *Alleyne* Court explained that "if 'a statute prescribes a *particular punishment* to be inflicted on those who commit it under special circumstances which it mentions, or with particular aggravations,' . . . those special circumstances must be specified in the indictment." *Id*., quoting 1 J. Bishop, Criminal Procedure 50, § 598, pp 360-361 (2d ed). This requirement is meant to allow "the defendant to predict the legally applicable penalty from the face of the indictment." *Id*. at 113-114.

As noted, the defendant must be "17 years of age or older" for the 25-year mandatory minimum in MCL 750.520b(2)(b) to apply. If the defendant's age is not charged and found by the jury, there is no mandatory minimum. See MCL 750.520b(2)(b); see also *Alleyne*, 570 US at 116-117. Accordingly, this fact increases the minimum penalty of the crime and therefore is an

element that must be charged. Here, defendant was convicted of two counts of CSC-I, only one of which charged him as a person "17 years of age or older." The other count charged him for "engag[ing] in sexual penetration . . . with a child under 13 years of age[.]" See MCL 750.520b(1)(a). The trial court applied the mandatory minimum to both counts of CSC-I despite only one of them being charged as "Defendant 17 years of age or older." This was plainly in error.[15]

The prosecution admits this error, but contends the error was harmless under the third *Carines* prong. However, we need not address whether the error was harmless because defendant cannot meet the fourth prong of the plain-error test. See *Carines*, 460 Mich at 763-764. In *United States v Cotton*, a case involving evidence that increases the statutory maximum sentence, the United States Supreme Court found that the omission of the quantity of a drug from the indictment "did not seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings" because the evidence establishing the quantity "was 'overwhelming' and 'essentially uncontroverted.' " *United States v Cotton*, 535 US 625, 632-633; 122 S Ct 1781;

[15] Defendant also notes that this count "does not reference the statutory section establishing the mandatory minimum." But he has failed to develop this argument, and he cites no authority for the proposition that the Sixth Amendment requires the information to cite the statute and indicate that the defendant will be subject to a mandatory minimum sentence. See *People v Head*, 323 Mich App 526, 546; 917 NW2d 752 (2018) (holding that by failing to cite any relevant authority defendant failed to properly present the argument that "the habitual-offender notice did not indicate that defendant would be subject to a 25-year mandatory minimum sentence"). Further, the information did cite the statute in the other charge arising out of the same incident. And, as noted below, defendant had knowledge of the relevant underlying fact—i.e., that he was 17 years old or older—that gave rise to the mandatory minimum. In these circumstances, we decline to address defendant's undeveloped argument.

152 L Ed 2d 860 (2002), quoting *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

Here, defendant contends that the error significantly affected the fairness of the trial. Specifically, he contends that failure to charge the fact of his age and the mandatory minimum statute as to both counts deprived him of proper notice of the judgment he received upon conviction. Defendant does not contest that he was over the age of 17 at the time he committed both counts of CSC-I and, in any event, the jury found that he was over the age of 17 at the time he committed both counts of CSC-I beyond a reasonable doubt.[16] And certainly, he had notice of his age and he could learn from the information's statement of the first count that his age (and the age of the victim) potentially subjected him to the same mandatory minimum sentence in MCL 750.520b(2)(b) that was cited in the first count. Cf. *United States v Yancy*, 725 F3d 596, 602-602 (CA 6, 2013) (holding that failure to include an element in the indictment did not deprive the defendant of notice when the defendant admitted to the relevant conduct and knew of the applicable sentencing enhancement when he did so). Further, defendant does not explain how the trial was unfair because of these considerations or what alternative action he would have taken with notice of the additional mandatory minimum charge.

This conclusion is further supported by how the Court addressed the fourth prong in *Carines*. In that case, the defendant alleged that the trial court improp-

[16] Although it was not charged this way in the information, the trial court instructed the jury, *on each count*, that it had to find the victim was under 13 years old and that defendant was 17 years old or older when he committed the offenses charged.

erly convicted him of felony murder by blending the felony-murder and aiding-and-abetting instructions together. *Carines*, 460 Mich at 768-769.[17] The trial court instructed that the prosecution needed to prove that the victim was killed by one of the robbers during the robbery, that there was malice, and that the defendant must have participated in the robbery. *Id*. However, the defendant complained that the instructions did not include the second element of aiding and abetting: "that defendant must have performed acts or given encouragement that assisted the commission of the [robbery]." *Id*. at 769. We held that this error did not satisfy the fourth prong of the plain-error standard even if it was not harmless because "the jury could not have reasonably concluded that defendant participated in the robbery and acted with malice without also concluding that he participated in the killing . . . ." *Id*. at 772. Likewise, as noted, the jury in this case concluded that defendant was at least 17 years old for both counts. Both counts arose out of defendant's

[17] *Carines* explained that the "the elements of felony murder are: 1) the killing of a human being, 2) malice, and 3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in the statute, among them armed robbery." *Carines*, 460 Mich at 768, citing *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995), disapproved of on other grounds by *People v Mass*, 464 Mich 615, 628 (2001). *Carines* explained that the elements of aiding and abetting are: "(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Carines*, 460 Mich at 768, quoting *Turner*, 213 Mich App at 568; but see *Mass*, 464 Mich at 628 (explaining that "[c]onviction of a crime as an aider and abettor does not require a higher level of intent with regard to the commission of the crime than that required for conviction as a principal. To the extent the cited language from *Turner*[, including the third element,] may suggest otherwise, it is disapproved") (citation omitted).

actions on a particular date, so he necessarily was the same age when the conduct supporting each count occurred.

For these reasons, defendant is not entitled to resentencing.

III. CONCLUSION

In conclusion, we hold that the trial court abused its discretion by declaring a mistrial in the initial trial without conducting a sufficient inquiry to support a finding of manifest necessity. As a consequence, those convictions will be vacated. However, with regard to his remaining convictions, because the evidence presented accusing defendant of committing prior acts of CSC against minors would have been admissible in a separate trial under MCL 768.27a and MRE 403—and defendant has not sufficiently developed an argument that his ex-wife's testimony would have been inadmissible—we hold that defendant is not entitled to a new trial, resentencing, or other relief. Finally, we hold that the trial court committed plain error by imposing a mandatory minimum sentence of 25 years under MCL 750.520b(2)(b) for the second count of CSC-I because the age requirement is an element that must be charged in the information and found by the jury, and it was not charged here. However, resentencing is unnecessary because the error did not affect the fundamental fairness of the trial.

MCCORMACK, C.J., and BERNSTEIN and CLEMENT, JJ., concurred with VIVIANO, J.

ZAHRA, J. (*concurring in part and dissenting in part*). While I concur with the majority opinion that defendant is not entitled to relief in Docket No. 160669 for

his acts against CS, I respectfully dissent from the decision in Docket No. 160668 to vacate defendant's convictions for his acts against TG on double-jeopardy grounds.[1] From my view, the majority opinion fails to give adequate deference to the trial court's decision to declare a mistrial. Instead, with the benefit of hindsight, the majority opinion lays out a more prudent course of action that the trial court could have followed when confronted with evidence that a juror investigated matters outside the trial proceedings. I agree that the trial court could have proceeded differently. But our caselaw has long held that decisions made by trial court judges in the heat of the moment and in the course of an ongoing trial are reviewed for an abuse of discretion. An abuse of discretion is not found merely because the trial court could have acted differently or because a reviewing court would have reached a different result. An abuse of discretion will only be found when the court's decision falls outside the range of principled outcomes.[2] Considering the totality of the facts and circumstances of this case, I conclude that the trial court did not abuse its discretion in declaring a mistrial when confronted with evidence that the jury may have been tainted. Because manifest necessity existed to support the trial court's declaration of a mistrial, defendant's retrial was not barred by double

[1] Given my conclusion that no double-jeopardy violation occurred in Docket No. 160668, I would not reach the questions of whether vacating those convictions entitles defendant to a new trial, resentencing, or any other relief on his other convictions in Docket No. 160669. I agree, however, with the majority opinion that the omission of defendant's age as an element of the second count of first-degree criminal sexual conduct in Docket No. 160669 does not warrant resentencing under *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[2] *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012).

jeopardy. Accordingly, I would affirm defendant's convictions in Docket No. 160668.

I. PERTINENT FACTUAL BACKGROUND

In July 2016, defendant was tried for two counts of second-degree criminal sexual conduct (CSC-II) for acts against his ex-wife's daughter, TG. After three days of testimony, the case was submitted to the jury on Friday, July 8, 2016. Roughly four hours into deliberation, the court received a note asking what happens when the jury is hung. The court brought the jury into the courtroom, read the standard instruction for a deadlocked jury, also known as an "*Allen* charge,"[3] and sent the jury back to deliberate for the remainder of the day.

At some point between the jury being sent back to deliberate and its dismissal for the weekend, one juror, Juror 337, informed the court that another juror, Juror 255, had done outside research on the case. There is no record of this initial interaction with Juror 337 in the July 8, 2016 transcript. Instead, the first reference to a juror possibly conducting outside research appears in the July 11, 2016 transcript, the following Monday. That morning, the court informed the jury that "there may have been some outside research done on topics or issues with regard to this trial" and asked the jurors whether they knew of any such research being conducted. Receiving no response, the trial court asked the

[3] "The term '*Allen* charge' is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked; the name derives from the first Supreme Court approval of such an instruction in [*Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896)]." *United States v Berger*, 473 F3d 1080, 1089 (CA 9, 2007). Michigan's standard instruction for a deadlocked jury is found at M Crim JI 3.12.

jurors to return to the jury room and write their juror numbers on a piece of paper along with any information they had about whether anyone "has done any outside research on topics at issue here." The court recounted the responses it received as follows:

> Okay. So I've received notes back from all jurors. There's only two at issue. One is from Juror 337, who we spoke to on Friday afternoon, who indicated: What I heard was not about the case, but a juror was looking into another discretion [sic] within his family.
>
> And then, another response from Juror 255: I didn't do any research on the case itself, nor do I know if anyone else did. Without mentioning anything about the case, I asked my mom about her past experience. . . .
>
> All the rest of the jurors had nothing significant to report.[4]

The court invited responses from the parties on how to proceed. The prosecutor believed that both jurors had been tainted and requested that they be replaced with two alternate jurors. Defense counsel objected to the substitution, argued that neither juror had brought any extraneous information into the case, and advocated in favor of having the original 12 jurors deliberate the case. The parties further elaborated on their respective positions:

> [*The Prosecutor*]: The People's position is the way it is for the following reason: Obviously, that means juror number [337][5] heard and/or perhaps was influenced, we don't know because we can't know what his findings are, but . . . it was to the point where he thought it was important that he brought it to this court's attention. He specifically said that he thought, and I was writing down

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[4] These notes were not preserved in the lower court file.

[5] The court and parties referred to the jurors by their juror numbers and seat numbers interchangeably. To avoid confusion, this opinion refers to the jurors by their juror numbers.

> what he[said], the best I could, because he was sort of in circles about what he said, but he said that what the juror was saying struck him as against the instructions this court had given him. *Specifically, he said that juror had spoke*[*n*] *to someone who had* [*t*]*his history of incidents and intended to determine the actions before and after to get an understanding of the actions in this case and why a person would do this or why a person wouldn't do that*.
>
> And so, clearly, juror number [337] heard that and was influenced and/or . . . perhaps not influenced, but heard that. So he would be tainted for that reason. And, then, obviously, juror number [255], by his own admission, he indicated that although . . . he didn't speak about the case. He said he spoke to his mom, but, obviously, brought that information that he spoke with his mom about into the jury room. That's how the juror knew about it.
>
> So, Judge, in order to not have a mistrial based on manifest injustice here, the People are suggesting that . . . a solution is to in fact ask that those two jurors be excused and ask the alternat[e] jurors be replaced. . . .
>
> [*Defense Counsel*]: Your Honor, brief response. We're not seeking a mistrial. If the prosecutor seeks a mistrial, then it's double jeopardy. They're not seeking a mistrial either. Really, what we're talking about is a challenge for cause during deliberation. And if the Court's wrong and does remove for cause and there's a conviction, it's reversible error. I say we go with the 12 jurors.
>
> Now, in the alternative, you could bring in each juror, the two jurors involved, individually and ask specifically what did you say, what did you learn, what do you know.[6]

The trial court disagreed with defense counsel that double jeopardy would bar retrial if the court declared a mistrial on these grounds and expressed its concerns about the extraneous information, stating:

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[6] Emphasis added.

> I disagree it would be double jeopardy for the prosecution if the Court calls a mistrial based on issues brought up by the jurors. So, that part I disagree with.
>
> I have serious concern about juror number 255, who apparently — and we do not know what experience he inquired about someone else. The other person . . . who he inquired with doesn't know anything about this case. But, what the juror knows is what's important.
>
> I can't say juror number 337 was necessarily influenced because he seemed a little unsure as to specifically what he was even hearing. But, I do have concerns regarding [juror number] 255.

The prosecution added that the jury may have misunderstood that "outside research" included gaining insight from nonjurors and offered additional information about the initial interaction with Juror 337:

> [I]f juror number [337] heard it, then, perhaps, it could be a presumption . . . that all the jurors had heard that. And when we ask them to go back into the jury room, we ask about specifically research. And I can't get in their heads, but [when] we spoke about research, oftentimes, we spoke about getting on the internet and bringing that information in, as opposed to perhaps just getting outside insight, which they're not allowed to do that either. . . . [W]e didn't feel like we had to spell that out for them, but that appears to be what did happen. And . . . *I'm not sure that juror number* [*337*] *was sitting with juror number* [*255*] *and they are the only two that had that conversation. It sounded as though there was a conversation in front of the whole jury, based on what juror number* [*337*] *said. So it's almost as if the entire jury had heard that. So if we determine that someone is tainted by that, the whole jury has been tainted by it*.[7]

After hearing from both parties, the trial court, over defendant's objection, declared a mistrial, stating:

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[7] Emphasis added.

> Quite honestly, we don't know if the conversation would influence for or against the defense or the prosecution. . . .
>
> We did not get enough information to even guess at that.
>
> . . . [T]he response from juror number 255 . . . says: Without mentioning anything about the case, I asked my mom about her past experience. Another juror overheard a conversation that sounds like it wasn't even with [juror number] 337 [sic: 255][8] but with yet another juror, and picked up enough about what that juror had said.
>
> At this point, I think the jury is tainted and I don't think bringing in two alternat[es] is going to help. I am going to declare a mistrial.

Defendant was later convicted of the two CSC-II counts as to TG at a subsequent trial held in 2017. The Court of Appeals affirmed his convictions, holding that his retrial did not violate double jeopardy.

II. LEGAL BACKGROUND

"Under both the Double Jeopardy Clause of the Michigan Constitution and its federal counterpart, an accused may not be 'twice put in jeopardy' for the same offense."[9] The Double Jeopardy Clause "protects a criminal defendant from repeated prosecutions for the same offense."[10] This protection encompasses the "ac-

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[8] Given that Juror 337 overheard that Juror 255 brought extraneous information into the jury room, it appears the trial court misspoke here and meant to refer to Juror 255.

[9] *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002), citing Const 1963, art 1, § 15, and US Const, Am V. See also *Benton v Maryland*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969) (holding that the Fifth Amendment's protection against double jeopardy applies to the states through the Fourteenth Amendment).

[10] *Oregon v Kennedy*, 456 US 667, 671; 102 S Ct 2083; 72 L Ed 2d 416 (1982). "The Double Jeopardy Clause has often been described, in simple terms, as embodying three separate guarantees: protection against a

cused's valued right to have his trial completed by a particular tribunal" once jeopardy has attached.[11] "Jeopardy is said to 'attach' when a jury is selected and sworn, and the Double Jeopardy Clause therefore protects an accused's interest in avoiding multiple prosecutions even where no determination of guilt or innocence has been made."[12] "If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity."[13] Defendant did not consent to the mistrial; therefore, the inquiry turns on whether "manifest necessity" existed, compelling the mistrial.

In *Arizona v Washington*, the Supreme Court of the United States reiterated the "classic formulation" for whether "manifest necessity" exists to warrant a mistrial:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for

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second prosecution for the same offense following acquittal, protection against a second prosecution for the same offense following conviction, and protection against multiple punishments for the same offense." *Lett*, 466 Mich at 214 n 9.

[11] *Lett*, 466 Mich at 214 (quotation marks and citation omitted).

[12] *Id*. at 215 (citations omitted).

[13] *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). See also *Lett*, 466 Mich at 215 ("[R]etrial is always permitted when the mistrial is occasioned by 'manifest necessity.' ").

> very plain and obvious causes. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."[14]

" 'Manifest necessity' is not to be interpreted literally or applied mechanically; what is required is a 'high degree' of necessity."[15] "Furthermore, differing levels of appellate scrutiny are applied to the trial court's decision to declare a mistrial, depending on the nature of the circumstances leading to the mistrial declaration."[16] "The strictest scrutiny is employed when the mistrial was premised on bad-faith conduct by the judge or prosecutor, and the most relaxed scrutiny is employed when the mistrial was premised on a deadlocked jury."[17] In cases such as this, "when some event creates the possibility that the jury may have been biased, the decision of the trial judge who has had the opportunity to observe the sequence of events in the context of the trial is entitled to special respect."[18] "[T]he trial judge's evaluation of the possibility of juror bias is entitled to 'great deference,' "[19] and "[a] reviewing court must 'accord the highest degree of respect to the trial

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[14] *Arizona v Washington*, 434 US 497, 506 & n 18; 98 S Ct 824; 54 L Ed 2d 717 (1978) (ellipsis omitted), quoting *United States v Perez*, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824).

[15] *Ross v Petro*, 515 F3d 653, 660-661 (CA 6, 2008), quoting *Washington*, 434 US at 506.

[16] *Lett*, 466 Mich at 218.

[17] *Ross*, 515 F3d at 661.

[18] *Gilliam v Foster*, 75 F3d 881, 894 (CA 4, 1996), citing *Washington*, 434 US at 512-514.

[19] *Ross*, 515 F3d at 661 (emphasis omitted), quoting *Washington*, 434 US at 511-514.

judge's evaluation of the likelihood' that the circumstances giving rise to the mistrial would have affected the impartiality of the deliberations of the jury."[20]

Although the trial court's decision to declare a mistrial on these grounds is afforded great deference, its discretion is not unlimited. "Determining whether manifest necessity exists to justify the declaration of a mistrial requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification for a mistrial."[21] To ensure the defendant's interest is adequately protected, the reviewing court must be satisfied that the trial court did not act "irrationally or irresponsibly," but instead "exercised 'sound discretion' in declaring a mistrial."[22] A trial court is not required to make explicit findings of manifest necessity, nor must it articulate on the record all the factors informing its decision to declare a mistrial, as long as sufficient justification for the ruling exists on the record.[23] Our court rules simply require that "[b]efore ordering a mistrial, the court must, on the record, give each defendant and the prosecutor an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives."[24] Ultimately, "the mere fact that the reviewing court would not have declared a mistrial under the circumstances of this

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[20] *Gilliam*, 75 F3d at 894, quoting *Washington*, 434 US at 511.

[21] *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994) (opinion by GRIFFIN, J.).

[22] *Washington*, 434 US at 514.

[23] *Id*. at 516-517; *Lett*, 466 Mich at 222 ("[W]here the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld.").

[24] MCR 6.417.

case does not mean that retrial is necessarily barred. The issue is not whether this Court would have found manifest necessity, but whether the trial court *abused its discretion* in finding manifest necessity."[25]

III. APPLICATION

Applying the aforementioned principles, I cannot conclude that the trial court abused its discretion in declaring a mistrial. After learning that a juror may have conducted outside research on the case, the trial court took reasonable measures of asking each juror to inform the court whether any outside research had been done. The court received two responses that both seemed to refer to the same extraneous information. The court then heard argument from both parties on how they wished to proceed, considered the parties' alternatives to declaring a mistrial, found those alternatives inadequate to cure the taint of possible juror bias, and ultimately declared a mistrial. These facts alone demonstrate that the trial court dutifully complied with its obligation under the court rules and acted deliberately and responsibly rather than abruptly or precipitously.

Further, a review of the record as a whole demonstrates that extraneous information was indeed brought into the jury room and created the *possibility* of juror bias sufficient to support a finding of manifest necessity to warrant a mistrial. By written submission, Juror 255 stated that he asked his mother about her past experience of sexual assault. Also, according to the prosecutor's recounting of the initial conversation with Juror 337 on July 8, 2016, Juror 255 "had spoke[n] to someone who had [t]his history of incidents and in-

[25] *Lett*, 466 Mich at 220.

tended to determine the actions before and after to get an understanding of the actions in this case and why a person would do this or why a person wouldn't do that."[26] Juror 255's actions—i.e., seeking an outside perspective on how a sexual assault may impact a person's behavior in order to assist him in deciding defendant's criminal sexual conduct case—were clearly improper and created the possibility of juror bias.

The context in which this possible juror bias arose also cannot be ignored. After the jury asked the court what would be the ramifications of a hung jury, the court issued an *Allen* charge encouraging further deliberation. Thereafter, Juror 337 informed the court of Juror 255's impropriety. The timing of these events gives rise to an inference that Juror 255 may have been trying to persuade other jurors on a particular disposition, which clearly would have affected the impartiality of the jury as a whole. This inference was not lost on the trial court, which concluded that other jurors, in addition to Juror 337, had been exposed to the extraneous information and that the entire jury had been tainted.[27] In short, the circumstances giving rise to the

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[26] Although there is no transcript of this conversation, we are not precluded from considering the prosecutor's statements and arguments that informed the trial court's declaration of a mistrial. See *Washington*, 434 US at 517 ("The basis for the trial judge's mistrial order is adequately disclosed by the record, which includes the extensive argument of counsel prior to the judge's ruling.").

[27] This conclusion is supported by the prosecutor's recounting of the July 8, 2016 conversation with Juror 337, which suggests that the entire jury had been exposed to the extraneous information. Further, although the other jurors' written responses indicated that they were not aware of any outside research being done on the case, the prosecutor noted that the jury likely did not understand that "outside research" included gaining insight from nonjurors. Indeed, Juror 255 stated that he "didn't do any research on the case itself," despite bringing extraneous infor-

possibility of juror bias occurred at a critical point in defendant's trial, and the trial court acted within its discretion in concluding that these circumstances warranted a mistrial. "[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of *one or more jurors may have been affected*" by the impropriety.[28] That the trial court did not elicit the precise information learned, or the extent to which that extraneous information may have influenced each juror, does not invalidate the court's decision to declare a mistrial.[29] It is the trial court, not this Court, that is in the best position to assess the possibility of juror bias.[30] Although neither the prosecutor nor defense counsel

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mation into the jury room, and Juror 337 stated that the information he overheard was "not about the case." These responses bolster the notion that other jurors also may have misunderstood what amounted to impermissible "outside research" done on topics or issues in the case.

[28] *Id*. at 511 (emphasis added).

[29] See *id*. at 512 (noting that, in *Simmons v United States*, 142 US 148; 12 S Ct 171; 35 L Ed 968 (1891), the Supreme Court upheld the trial court's declaration of a mistrial based on the possibility of juror bias even though the trial court had not "determin[ed] the truth or falsity of the charge" or "examin[ed] the jurors to ascertain what influence [the extraneous information] had upon them").

[30] As the Supreme Court explained in *Washington*, 434 US at 513-514:

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more conversant with the factors relevant to the determination than any reviewing court can possibly be. [Quotation marks and citation omitted.]

was at fault, "[n]either party has a right to have his case decided by a jury which *may* be tainted by bias[.]"[31]

I am also not convinced that the trial court was required to give the sort of extensive consideration of "less drastic alternatives" that the majority opinion seems to mandate.[32] In *Washington*, the trial court declared a mistrial based on defense counsel's improper argument during his opening statement.[33] The Supreme Court of the United States upheld the trial court's decision even though the mistrial was not strictly "necessary" insofar as an appropriate cautionary instruction may have counteracted the possibility of juror bias.[34] In *People v Lett*, this Court recognized that *Washington* does not require trial courts to examine alternatives or make findings on the record before declaring a mistrial, even noting that this Court's prior decisions requiring such examination rely on caselaw of questionable validity in light of *Washington*.[35] In-

[31] *Id*. at 516 (emphasis added). Because the "possibility" and "risk" of juror bias alone can warrant a mistrial, *id*. at 512-513, I disagree with the majority opinion that my position rests upon speculation and conjecture. Rather, the facts and circumstances apparent from the record support the trial court's declaration of a mistrial based on Juror 255's impropriety, which created a situation in which the entire jury may have been tainted.

[32] *Ante* at 15.

[33] *Washington*, 434 US at 498-499.

[34] *Id*. at 511.

[35] *Lett*, 466 Mich at 221-222 & n 13 ("[I]n support of the proposition that consideration of alternative measures is constitutionally required . . . , this Court in [*People v Benton*, 402 Mich 47; 260 NW2d 77 (1977),] cited two federal circuit court opinions that were subsequently overturned by the United States Supreme Court[.]"). Compare *Hicks*, 447 Mich at 843-844 (opinion by GRIFFIN, J.) (holding that the trial court's "failure to consider alternatives precludes a determination that manifest necessity justified [its] declaration of a mistrial"), citing

deed, our court rules simply require trial courts to give the parties "an *opportunity* . . . to suggest alternatives" on the record before declaring a mistrial,[36] and the trial court undoubtedly complied with this directive.

In any event, the trial court's consideration of the parties' proposed alternatives was adequate. Defense counsel's requests to have the original 12 jurors decide the case or bring Jurors 255 and 337 into the courtroom for further questioning ignores the trial court's conclusion that Juror 255's impropriety had tainted the entire panel. Also, defense counsel objected to the prosecutor's request to substitute Jurors 255 and 337 with two alternates, even arguing that their removal would amount to error requiring reversal. Defense counsel therefore left the trial court with two options: either continue the trial with a jury that the court believed was tainted, or declare a mistrial and give the

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Benton, 402 Mich 47, with *Hicks*, 447 Mich at 867 (BOYLE, J., dissenting) ("The assumption that, as a matter of law, manifest necessity requires the exploration of less drastic alternatives to mistrial also ignores that the United States Supreme Court has specifically rejected the proposition that all other alternatives to a mistrial must be explored on the record in the context of a mistrial triggered by the possibility of bias. In [*Washington*, 434 US at 511, 516-517], the Court held that the record did not have to reflect the exploration and rejection of all available alternatives so as to establish the necessity for mistrial.").

The majority opinion states that even if consideration of alternatives is not constitutionally required, the trial court's failure to consider alternatives in this case supports the majority opinion's conclusion that the trial court acted precipitately in declaring a mistrial. Not only does the majority opinion ignore the trial court's actual consideration of the alternatives proposed by the parties, see pp 35-37 and 46-47 of this opinion, it admittedly demands more of our trial courts than is constitutionally required. Indeed, if trial courts, in safeguarding a defendant's *constitutional* right against double jeopardy, are not *constitutionally* required to consider alternatives to declaring a mistrial, what other basis is there for requiring such consideration?

[36] MCR 6.417 (emphasis added).

parties a fresh start with a jury untainted by the possibility of bias. Under these circumstances, the trial court did not abuse its discretion in declaring a mistrial.

In sum, the trial court "exercised 'sound discretion' in handling the sensitive problem of possible juror bias created" by Juror 255 bringing extraneous information into the jury room.[37] The trial court "acted responsibly and deliberately," "gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial," and reasonably concluded that the possibility of juror bias permeated the jury room such that it was questionable whether an impartial verdict could be reached.[38] "[I]n these circumstances, the public's interest in fair trials designed to end in just judgements must prevail over the defendant's valued right to have his trial concluded before the first jury impaneled."[39] Accordingly, manifest necessity existed to support the trial court's declaration of a mistrial, and defendant's retrial was not barred by double jeopardy. Because this Court concludes otherwise, I respectfully dissent on this issue.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in Part II(A) of the majority opinion because I agree that the trial court abused its discretion by finding that a manifest necessity required the declaration of a mistrial. *People v Lett*, 466 Mich 206, 220; 644 NW2d 743 (2002). Accordingly, defendant's

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[37] *Washington*, 434 US at 516.

[38] *Id*. at 515-516. See also *Illinois v Somerville*, 410 US 458, 464; 93 S Ct 1066; 35 L Ed 2d 425 (1973) ("A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached . . . .").

[39] *Washington*, 434 US at 516 (quotation marks and citation omitted).

second trial on the charges of criminal sexual conduct allegedly perpetrated against TG violated the Double Jeopardy Clauses of both our state and federal Constitutions, and those convictions must be vacated. I do not, however, join the remainder of the opinion.

Because the now-vacated, constitutionally problematic 2016 charges were consolidated into a single trial with charges related to a different victim arising from conduct that occurred in 2017, the focus of Part II(B) of the majority opinion is whether the 2017 convictions were impermissibly tainted by the introduction of the 2016 charges and additional "other acts" evidence. The Court of Appeals, of course, has not yet addressed this analytical oddity.[1] For that reason, I would have preferred to remand this case to the lower court for its full consideration and to allow defendant to make additional arguments in light of today's ruling. Beyond that, I find the majority's analysis lacking. For example, it engages only in a footnote with how to characterize defendant's claimed error concerning the admission of other-acts evidence when charges that were the basis of a constitutionally prohibited trial are joined with charges forming the basis of a constitutionally permissible trial.[2] Nor does it discuss how that

[1] The panel summarily dismissed a related argument below, declining to fully address the issue because it concluded defendant's briefing was not sufficient.

[2] Defendant argues that the admission of evidence that formed the basis of the 2017 charges, barred from retrial by double-jeopardy principles, was a preserved constitutional error. That would mean that the prosecutor bears the burden of showing that the error was harmless beyond a reasonable doubt. See *People v Sammons*, 505 Mich 31, 56; 949 NW2d 36 (2020) ("This Court reviews preserved constitutional errors to determine whether the beneficiary of the error has established that the error was harmless beyond a reasonable doubt."). The majority characterizes the error as an evidentiary error, while citing at least one case that would suggest that defendant's designation of the error may be

characterization might affect preservation or the appropriate standard of review.

Most troubling in my view, however, is the majority's failure to faithfully conduct the analysis set forth by this Court in *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012). *Watkins* discussed MCL 768.27a, which allows evidence that a defendant committed a listed offense against a minor to be admitted for consideration "for its bearing on any matter to which it is relevant." MCL 768.27a(1). This includes propensity evidence that would generally be barred from admission. *Watkins*, 491 Mich at 470. Evidence introduced under MCL 768.27a remains subject to MRE 403, but the propensity inference of that evidence is drawn in favor of the evidence's probative value, not the danger of unfair prejudice. *Watkins* cautioned, however, that MCL 768.27a did not provide carte blanche to admit overly prejudicial evidence. *Watkins*, 491 Mich at 487. The Court listed several considerations that might lead a court to exclude such evidence. *Id*. at 487-488.[3] Importantly for present purposes, this Court was careful to note that the MRE 403 analysis must be applied

correct. See *Pacelli v United States*, 588 F2d 360, 364-365 (CA 2, 1978) (holding that the "spillover effects" of a double-jeopardy-barred charge being tried alongside properly lodged charges was a constitutional claim subject to review for whether the error was harmless beyond a reasonable doubt). While I express no opinion on what standard is correct, I believe this ambiguity between evidentiary and constitutional error further supports that a remand would be appropriate.

[3] These considerations, or the "*Watkins* factors," include:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Watkins*, 491 Mich at 487-488.]

"to each separate piece of evidence offered under MCL 768.27a." *Watkins*, 491 Mich at 489. When applying this new rule in *Watkins*, the Court explained that the trial court erred when it "failed to review separately under MRE 403 each act alleged . . . and instead lumped all of the evidence together." *Id*. at 493. It reiterated, "The trial court should have considered each act separately." *Id*.

Despite this clear directive in *Watkins*, the majority opinion fails to heed its instruction to balance *each* separate piece of evidence under MRE 403. It "lumps" all the other-acts-evidence testimony of defendant's teenaged daughters into one conclusory analysis. By approaching the analysis in this way, it is cloudy, at best, regarding whether some of the evidence admitted under MCL 768.27a should have been admissible under MRE 403. For example, ANB testified that defendant had "mov[ed] his hand up [her] thigh," which made her uncomfortable. ADB testified that defendant would "smack [her] butt" when she did the dishes. To assert that these instances of inappropriate touching are similar to the charged conduct at issue in the 2017 trial—violent sexual penetration—is untenable.[4] Yet when the testimony of ANB and ADB is presented in the same paragraph as analysis of the testimony of defendant's other daughter, AR, alleging that defendant touched her vagina with his hands and his mouth, the similarity or dissimilarity of *each* act becomes blurred.[5]

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[4] I do not suggest that for other-acts evidence to be admissible under MCL 768.27a it must be identical to the charged conduct, but acknowledging dissimilarities is an important part of the MRE 403 analysis.

[5] The majority agrees that *Watkins* requires separate consideration of each act, but does not believe that "spatial separation" is necessary for such consideration. Respectfully, in my view, a robust *Watkins* analysis

The majority opinion may ultimately reach the correct result—that there were no errors in the admission of the evidence discussed or that any errors were not prejudicial enough to defendant to warrant reversal.[6] Even still, instead of engaging in a truncated analysis, I believe it would have been much more prudent to remand to the Court of Appeals for full consideration in the first instance. By taking that route, our opinion would properly encourage our trial courts to zealously guard against the admission of unfairly prejudicial propensity evidence. And, after the review of our intermediate court, this Court would have been in a much better position to review defendant's arguments. Instead, the majority applies *Watkins*[7] in a way that I believe signals to the trial courts that "anything goes." Therefore, I respectfully dissent from Part II(B) of the majority opinion.[8]

WELCH, J., concurred with CAVANAGH, J.

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does require a lengthier analysis. Here, that would look like an MRE 403 balancing of AR's allegations, then an MRE 403 balancing of ANB's allegations, and then an MRE 403 balancing of ADB's allegations. I believe this would help avoid what I believe to be the murkiness in the majority's approach to the *Watkins* analysis.

[6] I note that I agree with the majority that some of the daughters' testimony involved conduct that was not admissible pursuant to MCL 768.27a because it did not involve a "listed offense." I further agree that the propriety of the admission of this evidence is governed by traditional principles concerning MRE 404(b) evidence and that it is doubtful that this evidence should have been admitted. That said, because I do not join the majority's conclusion that all of the other-acts evidence was admissible under *Watkins*, I am unable to opine on whether the admission of this propensity evidence was harmless or not.

[7] Notably, to my knowledge, this is the first time that this Court has applied *Watkins* since it was decided in 2012.

[8] Because I dissent from Part II(B), I express no opinion on Part II(C), given that the premise of that section is that defendant's convictions for the 2017 charges stand.

PEOPLE v CHRISTIAN
PEOPLE v EDWARDS
PEOPLE v HINTON

Docket Nos. 162354, 162355, and 162374. Argued on application for leave to appeal March 3, 2022. Decided July 27, 2022.

Kino D. Christian, Joshun Edwards, and C'Quan M. Hinton were found guilty of murder by a jury in the Genesee Circuit Court in 2007 and sentenced to life in prison. Defendants' direct appeals were unsuccessful. In 2014, Joshun Edwards's family filed a request under the Michigan Freedom of Information Act, MCL 15.231 *et seq*., for documents related to the case. Among the documents provided in response to the request was a transcript of the first interview with the prosecution's main witness, Jarylle Murphy, which the prosecution had not provided to defendants. Defendants moved for relief from judgment under MCR 6.508, arguing in part that because there were inconsistencies in the interview transcript that could have been used to impeach Murphy's testimony at trial, the prosecution's suppression of the transcript violated their constitutional right to exculpatory evidence under *Brady v Maryland*, 373 US 83 (1963). The court, Joseph J. Farah, J., denied the motions, ruling that although the prosecution had failed to disclose favorable evidence to defendants before trial, the evidence was not material and, therefore, reversal was not required. The Court of Appeals, LETICA, P.J., and K. F. KELLY and GADOLA, JJ., affirmed in an unpublished per curiam opinion issued October 22, 2020 (Docket Nos. 348753, 348807, and 349585). Defendants sought leave to appeal in the Supreme Court, which directed and heard oral argument on the application for leave to appeal. 507 Mich 952 (2021).

In an opinion by Chief Justice MCCORMACK, joined by Justices BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

The interview transcript that the prosecution suppressed was both favorable and material to the defense. Having established both good cause for failing to raise the issue on direct appeal and actual prejudice for purposes of MCR 6.508, defendants were entitled to a new trial.

1. Motions for relief from judgment are governed by MCR 6.508 *et seq*. A defendant bringing their first motion for relief from judgment has the burden of demonstrating two things. First, under MCR 6.508(D)(3)(a), they must show good cause for having failed to raise the grounds that they allege warrant relief on appeal. One way to establish good cause is by showing that an external factor prevented appellate counsel from raising an issue on direct appeal. Second, under MCR 6.508(D)(3)(b), they must show actual prejudice from the alleged irregularities that support their claim for relief. "Actual prejudice" for a convicted defendant means either that, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal, or that there was an irregularity so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand, regardless of its effect on the outcome of the case.

2. To establish a *Brady* violation, a defendant must show that the prosecution has suppressed evidence that is material and favorable to the accused. In this case, the only element of defendants' *Brady* claim that was in dispute on appeal was materiality. To establish that exculpatory evidence is material, a defendant must establish a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. A defendant need not demonstrate by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal; rather, the relevant question is whether the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. This standard is legally simple but factually complex, and whether the standard is met must be evaluated in the context of the entire record. Suppressed evidence may be material if it would have raised opportunities to attack the thoroughness or good faith of the underlying investigation.

3. Defendants demonstrated good cause for not raising the issue of the missing transcript on direct appeal because doing so was prevented by an external factor, namely, that the prosecution had suppressed the transcript. Defendants also demonstrated actual prejudice from the fact that the prosecution did not provide them with the transcript. The transcript was material because it would have provided more substantial impeachment evidence than any of the evidence defendants were provided, it would have undermined the other prosecution evidence and supported the defense theory, and it called the thoroughness and good faith of

the investigation into question. To prevail at trial, defendants needed the jury to believe that Murphy was not telling the truth, and the suppressed transcript would have provided more support for their strategy than the evidence that was known to defendants at the time of trial. The transcript, which documented the first statement that Murphy gave to the police and the one closest in time to the crime, differed from Murphy's trial testimony and his other statements in eight important ways: the time line of events on the day of the shooting, discrepancies regarding the possible motive, the failure to mention a van that figured into Murphy's later accounts, whether there was a girl present at the shooting, whether it was a shooter or the victim who was on a bicycle, whether Murphy and the victim were sitting down or walking when the shooters approached, discrepancies regarding how well Murphy could see, and where Murphy fled after the shooting. Despite the fact that Murphy's story was inconsistent with itself and with the physical evidence, it served as the basis for the prosecution's case. Had the suppressed transcript been disclosed, there is a reasonable probability that the result of the trial would have been different. It would have been powerful impeachment evidence of Murphy, the prosecution's central witness, making defendants' argument that he was fabricating his story more likely. And if the jury did not believe Murphy, the other evidence would also have been less believable. The state's suppression of the transcript called the thoroughness and good faith of the investigation into question. Because the transcript was material, defendants were prejudiced by its suppression, and but for this *Brady* violation, defendants would have had a reasonably likely chance of acquittal. Having established both good cause and actual prejudice, defendants were entitled to a new trial.

Reversed and remanded.

Justice CLEMENT, joined by Justices ZAHRA and VIVIANO, dissenting, agreed that the prosecution's failure to provide defendants with the transcript constituted suppression of favorable evidence under *Brady*, but she disagreed that the evidence met *Brady*'s materiality requirement because its impeachment value was limited and other inculpatory evidence admitted at trial corroborated defendants' guilt. She noted that Murphy's narrative was largely consistent each time he gave it, including the chronology of his movements on the day in question and the descriptions of the shooters, and she stated that the inconsistencies appeared to be the result of frailties in human recall rather than organized mistruths. Accordingly, she would have denied Christian's and Edwards's applications for leave to appeal. However, she would

have remanded Hinton's case to the trial court for an evidentiary hearing on his ineffective-assistance-of-counsel claim, which was based on trial counsel's failure to call two alibi witnesses. She explained that although Hinton's appellate counsel technically raised an ineffective-assistance argument on direct appeal by moving for a remand, the motion was denied because it failed to identify any particular deficiency for which factual development was required. Under those circumstances, she did not believe the procedural bar of MCR 6.508(D)(2) should apply.

CRIMINAL LAW — EVIDENCE — SUPPRESSION BY PROSECUTION — BRADY VIOLATIONS.

To establish a violation of *Brady v Maryland*, 373 US 83 (1963), a defendant must show that the prosecution suppressed evidence that was material and favorable to the accused; evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; whether the standard is met must be evaluated in the context of the entire record; suppressed evidence may be material if it would have raised opportunities to attack the thoroughness or good faith of the underlying investigation.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner* and *Alena M. Clark*, Assistant Prosecuting Attorneys, for the people.

Mary A. Owens for Kino D. Christian.

Goodman Sheikh, PC (by *Richard J. Goodman*) for Joshun Edwards.

Michigan Clinical Law Program (by *Kimberly Thomas*) for C'Quan M. Hinton.

Amicus Curiae:

Dykema Gossett PLLC (by *Jill M. Wheaton*) for The Innocence Network.

MCCORMACK, C.J. One of the foundational principles of our criminal legal system is that the state cannot

keep evidence from the accused—especially exculpatory evidence. The United States Supreme Court said so long ago in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), but you don't have to go to law school to understand that fundamental fairness requires the government to disclose evidence that calls an individual's guilt into question when it charges them with a crime. The legal test for determining whether relief follows the government's failure to give an accused exculpatory information isn't as intuitive, however: the suppressed evidence must have been "material."

Determining whether suppressed evidence is material is always a fact-driven task. As the United States Supreme Court has said, it can be "legally simple but factually complex" to sort out whether " 'there is a reasonable probability that, had the [suppressed] evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Turner v United States*, 582 US 313, 324; 137 S Ct 1885; 198 L Ed 2d 443 (2017), quoting *Cone v Bell*, 556 US 449, 470; 129 S Ct 1769; 173 L Ed 2d 701 (2009); see also *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

In this case, the prosecution suppressed the transcript of an interview with its most important witness. The transcript reveals that what the witness said in the interview differed from a later interview and the testimony he provided at both the preliminary examination and at trial. Because the suppressed evidence undermines the prosecution's star witness's testimony —testimony which is the thread that ties together the rest of the evidence—it meets the materiality threshold.

Because the prosecution suppressed evidence that was both favorable and material to the defense, the defendants are each entitled to a new trial.

I. FACTS AND PROCEDURAL HISTORY

On October 9, 2007, 14-year-old Robert Person was shot on a street corner just outside Flint. The prosecution eventually charged four men in connection with murder: Kino Christian, Joshun Edwards, C'Quan Hinton, and Dartanion Edwards. The jury found all four guilty of premediated murder and other charges, and they were sentenced to mandatory life in prison. Because Hinton was 17 at the time of the shooting, he was resentenced in 2015 pursuant to *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), to a term of 32 to 60 years' imprisonment.

In 2014, Joshun Edwards's family filed a request under the Michigan Freedom of Information Act, MCL 15.231 *et seq*., for documents related to the case. Among the documents provided in response to the request was a transcript of the first interview with the prosecution's main witness, Jarylle Murphy, which had not been provided to the defendants.

Three of the defendants—Kino Christian, Joshun Edwards, and C'Quan Hinton—filed motions for relief from judgment. MCR 6.500 *et seq*. They argued in part that the prosecution's suppression of the interview transcript violated their constitutional right to exculpatory evidence—that is, that the failure to provide it violated *Brady*. The trial court denied the motions, holding that the prosecution suppressed the transcript, and that it was favorable, but that it was not "material." The Court of Appeals affirmed. *People v Edwards*, unpublished per curiam opinion of the Court

of Appeals, issued October 22, 2020 (Docket Nos. 348753, 348807, and 349585), p 6.

A. CRIME SCENE EVIDENCE AND EARLY INVESTIGATION

Around 8:00 p.m. on October 9, 2007, Robert Person was shot to death at the corner of South Averill Avenue and Lippincott Boulevard in the Flint suburb of Burton. The Evergreen Regency Apartments, which many witnesses mentioned, are located at the southwest corner of the intersection. The Ten Eleven Market, which also featured in some witnesses' testimony, is located about a block east of the crime scene.

The police recovered 35 shell casings from the scene and conducted DNA analysis on two of them. None of the defendants' DNA profiles were present, but the DNA profiles of three unknown male donors were identified. Sergeant Sergio Thomas, who responded to the crime scene, testified that the shell casings were found in front of an apartment building on the east side of Averill, and that a trail of blood droplets led west on Lippincott and stopped at the entrance of the Evergreen Regency. The police also found a bike in a parking lot located at the northwest corner of the intersection.

The police found a car near the scene with a bullet hole in its side after the shooting and spoke with the driver, Ashlie Dye. Dye told the police that she saw a boy alone on a bike at the time of the shooting but had not seen the shooter(s).

The next day, the police spoke with Person's good friend, Anthony DeJon Williams. Williams told the police that he and Person spent the afternoon and evening together. After playing football at the Evergreen Regency Apartments, they went to a store on Lippincott with a couple of girls. On their way to the

store, a gray van approached them. Person told Williams, "Don't look back." On their return from the store, the van began to follow them and Person told Williams to leave with the girls because something bad would happen. Shortly after, Williams walked away with the girls, went into a nearby apartment, and heard gunshots. Williams was not called to testify at trial by any party, and there is no evidence that the police ever located or spoke with the girls.

B. JARYLLE MURPHY'S POLICE INTERVIEWS

1. OCTOBER 2007 INTERVIEW

About a week after the shooting, on October 16, 2007, 15-year-old Jarylle Murphy showed up at the police station and claimed he had witnessed the shooting. He arrived carrying a piece of paper with detailed descriptions of four shooters that included each shooter's skin tone, hair color, clothing, height, and age. For example, he described one of the shooters as about 5'11" to 6'0" with dark skin, black hair in long braids, a goatee, both ears pierced, wearing gray Dickies, a black shirt, black Jordans, a do-rag, and a black and gray hat. He also provided a drawing that showed the placement of the four shooters and a description of their four guns: two handguns, one AK-47, and one TEC-9. It is unclear when Murphy wrote the descriptions and made the drawing: a police summary of his interview said he did it the night of the shooting, but at trial, Murphy testified that he wrote the descriptions and made the drawing the night before he came to the police station.

Sergeant Lee Ann Gaspar interviewed Murphy, and Murphy explained that on the day of the shooting, he got on a bus with his sister, Shamonica Murphy, at

6:30 p.m. They then went to "the Bricks," an apartment complex, to "talk[] to her uncle for a minute." Murphy told the police the complex was off of Lapeer Road and 12th Street by the railroad tracks.

After the visit, Murphy said that he and his sister walked to the Evergreen Regency Apartments, which is about 1.9 miles from Lapeer and 12th. While walking around the apartment complex, they ran into Person, whom Murphy's sister knew, and she introduced them. Murphy said that all three went back to Person's apartment to get something to eat. Murphy said that his sister's friends came to pick her up in a van around 7:30 p.m. And at some point after that, Murphy and Person linked up with a girl with long black hair.

Murphy said he and Person headed up Lippincott toward the bus stop, but did not explain why they went there. It's unclear from the transcript whether the girl was already with them or if they met her later. As the two (or maybe three) of them were walking back from the bus stop, two men approached them around 8:00 p.m. One of them asked Person, "You the dude that snitched on my moms?" According to Murphy, Person and the two men argued. As the men left, one threatened that they would be back.

And that's what Murphy claimed happened next: the same two men, and two more, returned about an hour and a half later, around 9:00 p.m. or 9:30 p.m. They approached from behind; three on foot and one on a bike. Murphy explained that he looked back and "they started drawing their guns." He urged Person to flee and then ran away toward the middle of the Evergreen Regency complex. Murphy was not sure whether he was alone with Person when the shooting happened, or if the girl was still with them. When

asked if she was there for the shooting, he said, "I think so." But he was sure that they were sitting on the sidewalk when the shooters approached. When asked if he could see the shooters he said, "Not really, it was kinda dark."

Although Murphy's interview contradicted Anthony Williams's account to the police from the day after the shooting, the police never asked Murphy about Williams. Nor is there evidence that the police asked Williams about Murphy or that the police spoke to Williams again before the trial.

2. NOVEMBER 2007 INTERVIEW

Sergeant Gaspar interviewed Murphy again on November 8, 2007, and he provided some different information about the day of the shooting than he did in his first interview. He described going to the Haskell Community Center to play basketball around 4:30 p.m. with his cousins. He played a couple of rounds of pool there and then headed to the store. On the way, he ran into his sister and made a plan to go to South Flint to see her uncle. The two traveled to the uncle's house. But rather than stay "for a minute," as he claimed in October, they stayed "[m]aybe for 30 minutes."

Like he said in his earlier interview, Murphy described walking with his sister the 1.9 miles to the Evergreen Regency Apartments, meeting Person, and walking around with him. But Murphy added some important new information: While he was walking with Person, a brown and gray Dodge van pulled up with four girls in it. Person retrieved a phone charger and a purple and gray bike from the back of the van.

Murphy said that around 7:00 p.m., two men confronted them. One of the men, named Tony, asked

Person, "Why you go and snitch on my brother?" After that, a girl came up to talk with Person for about 30 minutes, but she left before the shooting occurred. Person and Murphy started walking on Averill and were almost to the corner of Lippincott and Averill when four men approached them from behind. Murphy said Person was pushing his bike at the time. He heard gunshots and began running. He said he "couldn't see them really good," because all he did was "turn around and take a glance." He said that two of the four had confronted them earlier and all of them had guns.

3. INFORMATION DISCLOSED TO THE DEFENDANTS BEFORE TRIAL

Before trial, the prosecution gave the defendants the transcript of Murphy's November interview, but not the transcript of Murphy's October interview; instead, they gave the defendants a police-created "summary" of that interview. And that summary was incomplete in some places and false in others. It misstated Murphy's time line. It claimed Murphy said the shooting happened at 8:00 p.m., which was what he said in November—but not what he said in October, which was 9:00 p.m. or 9:30 p.m. And while Murphy said in that October interview that one of the men accused Person of snitching on his mom, the summary erroneously states that Murphy said they accused him of snitching on a brother—again making the summary consistent with his November interview.

The summary also excluded important details from Murphy's October interview. It did not include Murphy's statements about the bicycle or the girl, so the defendants never knew that Murphy said one of the shooters was on a bicycle and Person was not, or that he said a girl was with them when the shooting happened. Nor did the summary mention that Murphy

claimed they were sitting on the sidewalk at the time of the shooting, that he could not see the shooters because it was "kinda dark," and that he fled to the middle of the Evergreen Regency Apartments after shots were fired.

Murphy testified at the preliminary examination. His testimony largely tracked his November interview but like that November interview, was inconsistent with the October interview suppressed by the prosecution.

C. TRIAL EVIDENCE

1.MURPHY'S TESTIMONY

Murphy's trial testimony was largely consistent with his preliminary examination testimony, his November statement, and with the false and incomplete police summary of his October statement—that is, it largely tracked the previous statements he made that were provided to the defendants. But it was inconsistent in many important ways with what he said during the October interview.

Murphy testified that his afternoon on the day of the shooting began at the Haskell Community Center, where he played basketball for 30 to 45 minutes. He said he ran into his sister on the way to the store and decided to go with her to see her uncle on the south side of Flint. In contrast to his November interview, when he said he was playing basketball at 4:30 p.m., he said they arrived at her uncle's home around 4:30 p.m. But his time line contrasted more starkly with what he told Sergeant Gaspar in October, when he claimed he did not board the bus to travel to the uncle's home until 6:30 p.m.

Murphy testified that he and his sister walked to the Evergreen Regency Apartments and she introduced him to Person. They went to Person's apartment to get something to eat, after which his sister left. He and Person walked around the complex and were approached by two men. He claimed that one of the men called Person "a snitch," as he described in his November interview. Murphy testified that they were then approached by a van with four girls in it from which Person retrieved a phone charger and a bike. He switched the order of these two events in his trial testimony: in November, he recalled Person getting the bike before they were confronted, at trial, he recalled it happening the other way around. And while he recounted the two incidents happening in the same order at trial and during the preliminary examination, in the preliminary examination he said the bike was purple; at trial he claimed it was gray and purple. Murphy never mentioned any of these details at all in his October interview, but because the defendants were not given the transcript of that interview they did not know that.

Murphy told the jury that they then met the girl on their way to the store and walked her home around 7:00 p.m., which largely tracked only his prior statements that the prosecution gave to the defendants (in his preliminary examination testimony he did not mention the trip to the store). But, in contrast, in his October interview he said the girl was still with them when the shooting happened.

Murphy's trial testimony about the shooting also was consistent with the only information available to the defendants, but inconsistent with his October interview. He testified that a group of men began walking behind them before the shooting. Just as Murphy

explained in the November interview, he said that Person was pushing a bike at the time. The defendants never knew that in his October interview, Murphy told the police that a *shooter* was on a bike and Person was not. Murphy also told the jury that when the shots were fired he ran "all the way up to maybe the corner of Lippincott and Dort" Highway, or about a half-mile due west of the shooting. The defendants never knew that in Murphy's October interview, he said that he ran into the Evergreen Regency Apartments complex, which is located right at the southwest corner of the intersection where Person was killed.

2. OTHER TRIAL EVIDENCE

The prosecution presented other evidence to support Murphy's story of the shooting. First, it presented shell casings recovered from the scene of the shooting. These shell casings contained DNA profiles of three unidentified males; none of the defendants' DNA profiles was present. The police never recovered a gun from the scene. But the prosecution presented a .380 caliber gun recovered in connection with a different shooting and testimony to connect that gun to one of the defendants, Christian.

Here's how (and bear with us). About a week after Person was killed, a man named Perry Manuel was driving an SUV with Christian in the passenger seat and two women in the backseat. They pulled up to another car on the street, and individuals inside that car began shooting at them. The shooting occurred near a Speedway gas station at the corner of South Center Road and Court Street in Burton, Michigan. Manuel was shot in the arm; he had a .380 caliber handgun with him that day. Security footage from the Speedway station showed Christian hiding a gun be-

hind a dumpster. The police recovered that .380 caliber gun and it was registered to a woman named Yoko Mason-Robertson, who was dating a man named William Harris.

The prosecution gave Harris immunity to testify. During a police interview, Harris had told police that he gave Mason-Robertson's gun to Joshun Edwards before Person's murder. The prosecution expected him to say so at trial, but instead he denied it. He said that he told Sergeant Gaspar that story when she interviewed him because she "basically . . . put me in a position. She basically told me that I either would be a defendant or I would be a witness." He explained that the two of them "just sat there and concocted a story . . . ."

Detective Ronald Ainslie was qualified as an expert witness in firearms analysis and tool marks. Ainslie testified that he had the ability to identify fired cartridge casings and fired bullets and link them to a particular firearm by "looking for . . . markings that are left on a fired cartridge cas[ing] or a fired bullet." These marks would allow him to "identify fired cas-[ings] as all being fired from a similar or from the same firearm."

Ainslie examined the casings and fired bullets found at the scene of Person's murder and the gun recovered from the gas station. When testifying about some of these bullets and casings, Detective Ainslie discussed the "lands and grooves" in particular firearms that leave specific marks on fired bullets or spent casings.

When asked to compare the gun recovered from the gas station with "two .380 CBC fired cartridge cas-[ings]" recovered from the scene of Person's murder, Ainslie said that the cartridge casings had been fired from the gun hidden at the gas station. But he did not

provide any evidence about the specific grooves within the gun or about corresponding marks on the casings that led him to this conclusion. Rather, he simply described the model of the gun found at the gas station—"High Point . . . model CF380"—and said it matched the fired cartridge casings.

Other witnesses testified about seeing either Person or one of the defendants during the day or evening of the shooting. Sinan Asmaro testified that he was working at the Ten Eleven Market the night of the shooting. Person was a frequent customer at the store and Asmaro recalled seeing him there that afternoon, around 3:00 p.m. or 4:00 p.m. But he couldn't remember if Person was alone. He also recalled seeing C'Quan Hinton in the store that day. He had told the police in an interview before trial that Hinton and Person might have spoken to each other, and that Person and another boy were making fun of Hinton, to which Hinton replied, "You better watch your back." But he had no memory of this at trial. Instead, he told the jury that the boys left the store laughing and smiling, explaining that it was "nothing serious" and that "[i]t wasn't words. It was more laughing." He recalled seeing Person come by the store again later. Person had a bike in front of the store, and was speaking with someone Asmaro did not recognize.

Shaquala Watson, who knew Person from school, testified that she also saw him at the Ten Eleven Market that day at about 7:30 p.m. She testified that she saw Person talking to an older man and that he was on a bike as she arrived at the market. When she left the store, she said that Person was by himself. About fifteen minutes later, she heard gunshots.

Xavier Regimbal, who worked for Hi-Tech Security, testified that he was patrolling the Evergreen Regency

Apartments the night of the shooting. Around 8:00 p.m., he heard gunshots while in the middle of the apartment complex. By the time he arrived at the corner of Averill and Lippincott, Person was on the ground. He didn't see anyone else at the scene or running away.

Leroy Marks, another Hi-Tech Security employee, was working at the Hi-Tech Security office located at the northwest corner of Averill and Lippincott the night of the shooting. He testified that he heard gunshots around 8:00 p.m. while he was walking in the parking lot. He testified that he saw Person running away from his bike before he was shot, and that he dropped the bike in the parking lot. He stated that he saw no one else running away that night and that the same boy who dropped his bike and ran was the boy who was shot.

As she told the police the night of the shooting, Ashlie Dye testified that she was driving down Averill when she saw a young boy on a bike, alone. And while the night of the shooting she told the police she did not see the shooters or anyone else in the area, she told the jury that she saw Kino Christian firing a gun with two other men. She also testified that she knew the other defendants but that none of them were the two other men she saw that night. She also revealed that she had previously been in a relationship with Christian and had a personal protection order against him.

Laquashia Blake, C'Quan Hinton's former girlfriend, confirmed the content of a statement she had previously made to the police at trial. In her prior statement, she said, as the prosecution put it, that "[Hinton] told her a few days after the murder that he knows who did the murder, but he wasn't going to

snitch" and that "[Christian] did the murder and also got him involved in the situation."

But Blake also testified that Hinton told her that "he didn't do it, and that it was a misunderstanding, that he didn't have anything to do with it," and she agreed that Hinton had told her—as the prosecution phrased it—that the police were trying to get people "to fold," that he was "not going to fold," and that "they can't put me there, or pull my prints off any gun or bullets[.]"

Monica McGee, Kino Christian's friend, testified that the night of the shooting, she heard sirens and called a lot of people from the neighborhood to see what happened, including Christian. She testified that she picked Christian up that night in her car. While she did not recall the exact location of the pick-up, the prosecution reminded her that in a statement to the police, she described picking him up from an apartment complex on Lippincott near Tony's Party Store. With her memory somewhat refreshed she said, "I think I picked him up at those apartments on Lippincott, but I don't know." She testified that they drove to her house in Grand Blanc and watched movies. Although she did not recall at trial, the prosecution reminded her that she had told the police in an earlier interview that while Christian was there, he got a phone call from C'Quan Hinton, who was his nephew. She did not recall what they talked about.

Robert Moore, a jailhouse informant, testified that Christian confessed to the murder while they were locked up together. In exchange for his testimony, the prosecution helped him transfer his probation to another state and may have gotten him an early release (his testimony about the early release was equivocal and was never made clear by the prosecution).

Moore overlapped with Christian in both city and county jail and with Joshun Edwards in county jail. Moore testified that Christian said he was upset with Person because he "was a snitch and he had to be dealt with." He said that Christian said he ran into the girls from the Dodge van at some point on the day of the shooting, who told Christian that they planned to give Person a phone charger and bike. Moore said Christian told him that he and Hinton then confronted Person, and then they went to get guns. Moore said Christian told him that Hinton, Joshun Edwards, and Dartanion Edwards were with him during the shooting and that Person was pushing his bike when they shot him. Each of the details in Moore's account of Christian's detailed jailhouse confession were in police reports; he provided no information that was not in those reports when he was interviewed by the police, something that became the focus of the defense at trial.

The defendants maintained their innocence. They argued that Jarylle Murphy was not believable, that they had alibis, and that three other men were responsible for the shooting.

They had material to work with in arguing Murphy was not believable, even without the October interview transcript. Murphy's identifications of the defendants at trial were undermined by his hesitation in his November interview. And by Murphy's own account, he saw the shooters at a distance, for mere seconds, in poor lighting at night. Murphy's credibility was also undermined by the inconsistencies the defendants were aware of between his trial testimony and his earlier statements about the incident. The defendants argued that Murphy was lying because he was a member of a rival gang.

Two of the defendants also presented alibis. Christian testified that he was selling drugs at the time of the shooting out of an apartment on Lippincott and Center Road. Christian's testimony was consistent with Monica McGee's statement to the police that she picked him up from an apartment on Lippincott near Tony's Party Store; Tony's Party Store is about a block from Lippincott and Center. Joshun Edwards testified that he was at the Terrace Apartments off of Atherton Road on the evening of the shooting. He arrived there around 7:30 p.m. and was hanging out with friends in the parking lot.

Christian testified that he told Sergeant Gaspar that William Harris, Perry Manuel, and a man known as "Pooh Bear" were responsible for the shooting. He had been with them at the apartment at Lippincott and Center on the day of the shooting when one of them got a phone call, prompting the three men to grab guns and leave. He recalled Manuel coming back to the apartment later and saying, "Kino, you should have seen [him] fly off the bike."

Joshun Edwards testified that William Harris admitted to him that he killed Person with Perry Manuel and Pooh Bear. Recall that Harris was the witness whom the prosecution hoped would connect Christian and Joshun Edwards to his girlfriend's gun. In his testimony, Harris confirmed that he was at the apartment on Lippincott and Center the day of the shooting and that Perry Manuel was there too, just as Christian testified. But he denied killing Person.

Edwards also testified about his relationship to Robert Moore—the jailhouse informant. He explained that Moore told him he knew Edwards and Christian were innocent and that he would come forward with the information if Edwards paid him. He was housed in

the same pod as Moore at the county jail and they were cellmates at one point. Because Robert Moore offered to help with his case, Edwards explained, "I let Robert see my paperwork. I wanted to show him how these witnesses were lying on us." He even let Moore keep the police reports overnight.

Perry Manuel died in an unrelated shooting before the trial in this case. And there is no evidence that Pooh Bear was ever identified by the police. Sergeant Gaspar testified that although Williams Harris was once a suspect in the case, the police never tested his DNA. Nor did they test the DNA of the other two men the defendants argued committed this crime, Perry Manuel and Pooh Bear, even though the casings recovered from the scene had three unknown male DNA profiles on them.

D. MOTIONS FOR RELIEF FROM JUDGMENT

Three of the four defendants filed motions for relief from judgment,[1] arguing in part that the suppression of Murphy's October interview transcript violated their right to exculpatory information as required by *Brady v Maryland*, 373 US 83.

The trial court denied all three motions. It found that the transcript of Murphy's October interview had been suppressed by the prosecution and that it was favorable to the defense, but that it was not material. The court reasoned that because the defendants impeached Murphy with the November interview transcript and his testimony from the preliminary examination, "[c]ounsel had considerable opportunity to draw out contradiction by Murphy for the jury's attention" without it. And in the court's view, the summary

[1] Dartanion Edwards did not file a motion for relief from judgment.

of the October interview was "substantially similar" to Murphy's statements in the suppressed transcript.

The court was also persuaded that because Murphy was not the only witness to implicate the defendants in the shooting, more impeachment evidence would not have made a difference. Ashlie Dye identified Christian as one of the shooters, and Robert Moore testified that Christian implicated the three other defendants in a jailhouse confession.

The Court of Appeals affirmed. The panel reasoned that while the defendants did not have the transcript of the October interview, they knew it had happened and received a summary. *Edwards*, unpub op at 6. And the defendants were able to "undermine Murphy's credibility respecting his identification of them as the shooters" and argue that Murphy "fabricated his testimony" with the evidence they were provided. *Id*. at 6-7.

The panel acknowledged that "discrepancies existed" between the suppressed transcript and Murphy's trial testimony that were "not entirely insignificant." *Id*. at 7. But, in the panel's view, defense counsel were still able to question Murphy "extensively concerning his version of events." *Id*. at 8. For example, they drew out a discrepancy about the color of the bike. In this example, though, the panel inaccurately reported the record: it explained that Murphy said the bike was black at the preliminary examination, contrasting with his trial testimony that it was purple and gray. *Id*. In fact, Murphy testified that the bike was purple at the preliminary examination.

The panel seems to have been convinced that the other evidence in the case made any missing impeachment of Murphy immaterial too. That is, the panel believed that the prosecution "presented direct and circumstantial evidence from which the jury could find

each defendant guilty beyond a reasonable doubt" apart from Murphy's testimony. *Id*. at 10.

That testimony, according to the panel, included Moore's testimony about Christian's jailhouse confession, Dye's testimony implicating Christian, and the security camera footage showing Christian disposing of a gun at a gas station after the separate drive-by shooting involving Perry Manuel. *Id*. Although Dye's testimony and the gun found at the gas station were potentially probative of only Christian's guilt, the panel, without explanation, analyzed the evidence as if it applied to all three defendants. And this analysis led the panel to conclude that the suppressed transcript was not material in any of the defendants' cases. *Id*. at 11.

The defendants sought leave to appeal in our Court. We ordered oral argument on the application, asking all three defendants to address whether "the lower courts erred by holding that the suppressed October 16, 2007 interview transcript was not material to their guilt such that they were not entitled to relief under *Brady v Maryland* and *People v Chenault*." *People v Christian*, 507 Mich 952, 952 (2021) (citations omitted).[2]

II. ANALYSIS

A. STANDARD OF REVIEW

A trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion. *People v Washington*, 508 Mich 107, 130 n 9; 972 NW2d 767

[2] We also considered C'Quan Hinton's claim that he received ineffective assistance of counsel. Because we conclude that all three defendants are entitled to a new trial under *Brady*, there is no need for us to address Hinton's separate claim in this opinion.

(2021). An abuse of discretion occurs when the court makes a decision that "falls outside the range of reasonable and principled outcomes," *id*., or "makes an error of law," *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). A trial court's decision on a *Brady* claim is reviewed de novo. *People v Smith*, 498 Mich 466, 475; 870 NW2d 399 (2015).

B. MOTION FOR RELIEF FROM JUDGMENT

The defendants filed motions for relief from judgment governed by MCR 6.508 *et seq*. A defendant bringing their first motion for relief from judgment has the burden of demonstrating two things. First, they must show "good cause for failure to raise such grounds on appeal . . . ." MCR 6.508(D)(3)(a). One way to establish good cause is by showing that an external factor prevented appellate counsel from raising an issue on direct appeal. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995).

Once a defendant demonstrates good cause, a new trial is only warranted if they also show "actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3)(b). When a defendant is convicted after trial, like the defendants here, "actual prejudice" means that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal[.]" MCR 6.508(D)(3)(b)(i)(A). Alternatively, a defendant can show actual prejudice where there is an "irregularity so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]" MCR 6.508(D)(3)(b)(iii).

C. *BRADY v MARYLAND*

The defendants argue in their motions for relief from judgment that the prosecution's failure to provide Murphy's October interview transcripts violated *Brady v Maryland*, 373 US 83. To establish a *Brady* violation, a defendant must show that: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014), citing *Strickler v Greene*, 527 US 263, 281-282; 119 S Ct 1936; 144 L Ed 2d 286 (1999). The parties do not dispute that the transcript was suppressed and is favorable, and the lower courts agreed. The only element of the defendants' *Brady* claim in dispute on appeal is materiality.

To establish that exculpatory evidence is material, a defendant must show that " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Id*., quoting *Bagley*, 473 US at 682. A "reasonable probability" means " 'a probability sufficient to undermine confidence in the outcome.' " *Chenault*, 495 Mich at 150, quoting *Bagley*, 473 US at 682 (opinion of Blackmun, J.). A defendant need not "demonstrat[e] by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995). Rather, the relevant question is whether the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*.[3]

[3] Hinton argues that this Court should follow other jurisdictions and adopt a materiality standard that is easier for a defendant to meet than the standard mandated under the federal Constitution. See, e.g., *State v Laurie*, 139 NH 325, 330; 653 A2d 549 (1995) (under the New Hampshire constitution the prosecution bears the burden to prove

We agree with the United States Supreme Court that the standard for materiality is "legally simple but factually complex." *Turner*, 582 US at 324. The Court's applications of this standard are helpful with the complex part.

1. *TURNER v UNITED STATES*

First, in *Turner v United States*, the Court showed us how to evaluate the materiality of suppressed evidence " 'in the context of the entire record . . . .' " *Id*. at 324-325, quoting *United States v Agurs*, 427 US 97, 112; 96 S Ct 2392; 49 L Ed 2d 342 (1976). The *Turner* defendants were convicted of robbing and assaulting a woman in a parking garage. *Turner*, 582 US at 316-317. The prosecution's theory was that the victim had been attacked by a large group. *Id*. at 317. The prosecution's evidence centered on the testimony of two witnesses—Calvin Alston and Harry Bennett—who confessed to participating in the attack and testified in exchange for leniency. *Id*. While their accounts differed on small details, both said that a large group of people (including them) had attacked the victim.

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beyond a reasonable doubt that undisclosed evidence would not have affected the verdict); *People v Fuentes*, 12 NY3d 259, 263; 907 NE2d 286 (2009) (applying the "reasonable probability" standard to a *Brady* violation in certain circumstances). This Court has never addressed under what circumstances withheld evidence requires granting a defendant a new trial under the Michigan Constitution. Cf. *Chenault*, 495 Mich at 155 (addressing the appropriate standard under the federal Constitution as provided in *Brady*). Because we conclude that the defendants are entitled to relief under the *Brady* standard—which provides a constitutional floor for the circumstances under which relief must be granted for withheld exculpatory evidence—we need not decide whether the Michigan Constitution requires a different materiality standard.

The defendants argued that suppressed evidence would have allowed them to advance an alternative theory that the victim had been attacked by a single perpetrator. *Id*. at 325. First, suppressed notes from a police interview with a man named Willie Luchie revealed that Luchie had walked by the garage the night of the attack and heard groans. *Id*. at 321. Second, the man who discovered the victim in the garage testified that two men had stopped in the garage for about five minutes while he was waiting for the police to arrive. The police suppressed the identity of these two men, and one of them was later arrested for robbing and assaulting other women in the neighborhood. *Id*.

The defendants' view was that had they known about this suppressed evidence, they could have argued to the jury that the crime was committed by a single perpetrator—the man later arrested for a different crime—not a group. The Court held that the suppressed evidence was not material, because it was "too little, too weak, or too distant from the main evidentiary points . . . ." *Id*. at 326. While the prosecution's central witnesses, Alston and Bennett, were not completely consistent about every detail, "virtually every witness to the crime itself agreed as to a main theme: that [the victim] was killed by a large group of perpetrators." *Id*. The suppressed evidence did not undermine the central evidence that established the prosecution's theory of guilt such that it created a reasonable probability of a different result.

2. *WEARRY v CAIN*

In contrast, the United States Supreme Court found that suppressed evidence was material in *Wearry v*

Cain, 577 US 385; 136 S Ct 1002; 194 L Ed 2d 78 (2016). In that case, a man named Sam Scott contacted the police while incarcerated and implicated the defendant in a brutal murder that occurred two years earlier. *Id*. at 386. Scott's original account did not match the physical evidence of the crime, and his story changed substantially over time to become more consistent with the other evidence. *Id*. at 387. Still, he was the prosecution's "star witness" at trial. *Id*. Another prosecution witness—Eric Brown—testified, consistently with Scott's account, that he saw the defendant with a man who looked like the victim that night.

The defendant presented an alibi defense—his relatives testified that he was at a wedding about 40 miles from the crime when it occurred. *Id*. at 388. The Court characterized the prosecution's trial evidence as "a house of cards" that required the jury to credit Scott's testimony rather than the defendant's alibi. *Id*. at 392.

The prosecution suppressed impeachment evidence that undermined Scott's credibility further and evidence that Brown had sought a deal to reduce his sentence in exchange for testifying. *Id*. at 390. In concluding the evidence was material, the Court reasoned that "the only evidence *directly* tying" the defendant to the murder "was Scott's dubious testimony, corroborated by the similarly suspect testimony of Brown." *Id*. at 393 (emphasis added). While Scott's credibility was challenged at trial, the Court reasoned that it "would have been further diminished had the jury learned" about the added impeachment evidence. *Id*. And, Brown's testimony—if believed—helped corroborate Scott's testimony. The evidence that Brown had a motive to lie would have undermined the confidence not only in his testimony, but in Scott's too. *Id*. at 394.

3. *KYLES v WHITLEY*

Finally, *Kyles v Whitley*, 514 US 419, is also important. The defendant was convicted of the murder of Dolores Dye, who was shot in the head while putting grocery bags in her car. *Id*. at 423. The man who shot her took her keys and drove away. Two days later, a man named Beanie called the police station and reported that he had bought a car matching the description of the stolen car from the defendant. *Id*. at 424. Beanie claimed he came forward to the police because he feared the defendant had stolen the car. But Beanie's story changed over time and grew inconsistent with the details of the crime known to the police. And yet, "[t]he police neither noted the inconsistencies nor questioned [him] about them." *Id*. at 427.

The prosecution withheld recordings of the conversations between the police and Beanie in which his story changed. *Id*. at 428. The Court found that the suppressed evidence was material in part because it "would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation . . . ." *Id*. at 445. Beanie's statements to the police "were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see [the defendant] arrested" for the murder. *Id*. The statements would have "revealed a remarkably uncritical attitude on the part of the police." *Id*. *Kyles* shows that determining whether defendants received "a trial resulting in a verdict worth of confidence" requires an analysis not just of the evidence presented, but of the quality of the investigation.

D. THE DEFENDANTS HAVE DEMONSTRATED GOOD CAUSE

The prosecution does not dispute that the defendants have demonstrated good cause. While neither the trial court nor the Court of Appeals addressed the issue of good cause, both concluded that the prosecution suppressed the transcript. That suppression was an "external factor" that prevented appellate counsel from raising a *Brady* violation on direct appeal. *Reed*, 449 Mich at 378.

E. THE DEFENDANTS HAVE DEMONSTRATED ACTUAL PREJUDICE BECAUSE THE OCTOBER TRANSCRIPT WAS MATERIAL

The transcript of Murphy's October interview was material for three reasons. First, it would have provided far more substantial impeachment evidence than any of the evidence the defendants were provided. Second, it would have undermined the other prosecution evidence and supported the defendants' theory of defense. And third, the suppression of the transcript calls the thoroughness and good faith of the investigation into question.

To prevail at trial, the defendants needed the jury to believe that Jarylle Murphy was not telling the truth. The transcript of his October interview would have provided far more support for their strategy than the evidence that was known to defendants at the time of trial. The transcript differed from Murphy's trial testimony and from his prior statements that the defendants were provided—the November interview and preliminary examination testimony—in eight important ways. These inconsistencies are more compelling because it was the first statement he gave to the police, and the one closest in time to the crime. And even worse, the summary of the October interview that was

provided instead of the transcript left out or changed the important inconsistencies.

First, the time line of events on the day of the shooting. The suppressed transcript reveals that Murphy told Sergeant Gaspar that he boarded a bus to South Flint at 6:30 p.m. and that the shooting took place around 9:00 p.m. or 9:30 p.m. Testimony of other witnesses, including Xavier Regimbal, the security guard patrolling the Evergreen Regency Apartments that night, made clear that the shooting happened around 8:00 p.m., as Murphy himself would later say in his November interview and preliminary examination testimony. The jury never learned about this change in Murphy's story because the summary changed the detail; it says he reported that the shooting took place at 8:00 p.m.

Besides the changed story, Murphy's statement that he did not board the bus to South Flint with his sister until 6:30 p.m. in his original interview would have made it virtually impossible for him to be present at the shooting by 8:00 p.m. He would have had to ride the bus across town, visit with his sister's uncle, walk 1.9 miles, meet Person for the first time, have the initial confrontation with the two shooters, and meet the girl—all in an hour and a half. Because Murphy never again mentioned boarding the bus at 6:30 p.m. —and that detail did not appear in the summary of the October interview—the defendants could not question Murphy on how he would have been able to be present at the crime scene when it happened.

Second, motive. The suppressed transcript reveals that Murphy said that one of the men accused Person of snitching on his mom—unlike his later accounts, where he says one of the men accused Person of snitching on his brother. The jury never knew about

this inconsistency either, as the summary falsely changed this detail to make it consistent with Murphy's revised story.

Third, the van. The suppressed transcript reveals that Murphy never mentioned Person getting a phone charger and bike from a Dodge van during the October interview. Those details first emerged in his November interview and remained consistent moving forward. But because the defendants only had the summary, the jury never found out that Murphy never mentioned the van in his original interview.

Fourth, the girl. The suppressed transcript reveals that Murphy claimed that the girl was still with him and Person when the shooting happened, unlike his later statement and trial testimony that the girl had left before Person was killed. The jury never learned about this change in Murphy's story either because the summary omits this detail too.

Fifth, the bike and who rode it. The suppressed transcript reveals that in October Murphy was adamant that one of the shooters, and not Person, was on a bike; and he sticks to this story even when asked multiple times. By his November interview, Murphy said that Person was on a bicycle at the time of the shooting, and this is what Murphy told the jury as well. But the jury never learned that Murphy's story changed in this important way because the misleading summary omitted this inconsistency too.

Sixth, the location of the shooting. The suppressed transcript reveals that Murphy claimed he and Person were sitting down when the shooters approached. By his November interview he said they were walking at the time, and he told the jury that as well. The jury never knew about this change of story either; it too was omitted from the summary.

Seventh, Murphy's ability to see. The suppressed transcript reveals that Murphy did not express confidence in his ability to see the shooters because it was "kinda dark." He told the jury, however, that he was confident that the defendants shot Person. The defendants challenged Murphy's ability to identify the shooters given the time of night and the fact that the shooters approached from behind. But their challenge would have been more convincing if they had known that when Murphy first spoke to Sergeant Gaspar he told her he was not confident he could identify the assailants. The jury never learned that fact because the inaccurate summary omitted it.

And eighth, where Murphy fled after the shooting. The suppressed transcript reveals that Murphy claimed that as shots were fired he ran into the middle of the Evergreen Regency complex, which is at the intersection where Person was killed. But he told the jury that he ran about a mile due west of the shooting, just as he had at the preliminary examination. The jury never learned about this story change either—it, too, was omitted from the summary.

Each inconsistency is significant, but the sum of them is striking.

	Suppressed October Transcript	Summary of October Interview	November Interview	Preliminary Examination Testimony	Trial Testimony
Time of shooting	9:00 p.m. or 9:30 p.m.	8:00 p.m.	8:00 p.m.	8:00 p.m.	Not discussed
Motive for the shooting	Snitching on "moms"	Snitching on "brother"	Snitching on "brother"	Snitching on "brother"	Snitching
Whether Person obtained a phone charger and bicycle from four girls in a van	No	*Not Mentioned in Summary*	Yes	Yes	Yes
Whether the girl was still with Murphy and Person during the shooting	Yes	*Not Mentioned in Summary*	No	No	No
Who had a bicycle during the shooting	One of the shooters	*Not Mentioned in Summary*	Person	Person	Person
Where Person and Murphy were located during the shooting	Sitting on the sidewalk	*Not Mentioned in Summary*	Walking	Walking	Walking
How well Murphy could see the shooters	Not well because it was "kinda dark"	*Not Mentioned in Summary*	Not well because all he could do was "take a glance"	He could see the shooters well	He could see the shooters well
Where Murphy ran after the shooting	Into the Evergreen Regency Apartments	*Not Mentioned in Summary*	Not discussed	Up Lippincott toward Crocker (due west)	Up Lippincott toward Dort Hwy (due west)

Murphy's testimony was central to the prosecution's case, and the suppressed transcript would have significantly undermined it. The jury never knew the extent to which Murphy's story changed from his first interview. The transcript of that interview was not "too little, too weak, or too distant from the main evidentiary points . . . ." *Turner*, 582 US at 326. Quite the opposite.

The Court of Appeals acknowledged some of these inconsistences, although incorrectly in part, but was not persuaded the additional impeachment evidence mattered. It is true that the defendants were able to highlight some inconsistencies between the versions of Murphy's story they were aware of, but the inconsistencies that could have been emphasized with the October interview are more significant. That the defendants argued to the jury that there were reasons to doubt Murphy's story does not make *more* evidence

that he was lying immaterial. To the contrary, it makes the possibility that the result of the trial would have been different *more* likely.

The Court of Appeals made a second error in its consideration of the other evidence presented. The panel concluded that the transcript was also not material because "the prosecution presented direct and circumstantial evidence from which the jury could find each defendant guilty beyond a reasonable doubt of the charged offenses *independent* of Murphy's testimony." *Edwards*, unpub op at 10 (emphasis added). Put another way, because there was sufficient evidence notwithstanding Murphy's testimony, even if the transcript led the jury to discredit him completely, the panel concluded that there was not a reasonable probability that the result of the proceeding would have been different.

But this reasoning misses the quality of the other evidence, and Murphy's centrality to it. That other evidence "would have been further diminished had the jury learned" about the suppressed evidence. *Wearry*, 577 US at 393.

Beyond Murphy's testimony, the prosecution's evidence included: (1) the .380 caliber casings and the .380 caliber gun hidden by Christian at the gas station, (2) Ashlie Dye's testimony implicating Christian, (3) Laquashia Blake's testimony about Christian and Hinton's possible involvement, and (4) Robert Moore's testimony about a jailhouse confession by Christian implicating the other defendants. Without Murphy's testimony to organize and tie together the remaining fractured stories, the sum of this other evidence loses much of its value.

If Murphy was discredited, the fact that Christian was found with a .380 caliber gun after his involve-

ment in an unrelated shooting becomes less relevant. Without Murphy implicating Christian as one of the shooters, then Christian likely hid the gun because of its connection with the drive-by shooting we *know* it was connected to. And without Murphy's testimony connecting Christian to the shooting, that gun implicates Perry Manuel and William Harris at least as much as Christian; it was registered to Harris's girlfriend and used in connection with the 2007 shooting of Manuel. Manuel and Harris, of course, are two of the three men the defendants argued were responsible for this crime.

Detective Ronald Ainslie's expert testimony would also lose its relevance in connecting Christian to the murder without Murphy's testimony. Detective Ainslie testified that the spent .380 caliber casings recovered from the scene of Person's murder had been fired from the gun found at the gas station. But his opinion was based not on a unique attribute of the recovered casings or on the particular gun found, but on generic characteristics of that model of gun. That is, a .380 caliber was fired by Person's assailants, and while Ainslie told the jury the casings were from the particular .380 caliber recovered, he apparently did not identify any "lands" or "grooves" or other specific markings that supported his conclusion.

Put differently, while he told the jury about how a ballistics expert can tie a particular bullet or casing to a particular firearm, and that some of the bullets recovered from the crime scene had markings that would allow such a connection to be made, he offered no information about the particular casings he said came from the gas station gun.

If the jury didn't believe Murphy, it would have had more reason to doubt Ashlie Dye too. Dye, who told the

police the night of the shooting that she did not see the shooters, identified Christian as one of them a year later. The jury learned about this inconsistency, and about Dye's possible motive to implicate Christian, but Murphy's identification of Christian as one of the shooters bolstered Dye's.

If the jury didn't believe Murphy, the value of Blake's testimony would also diminish. Blake told the police before trial that Hinton had told her that Christian committed the murder and "got him involved." But at trial, she testified that Hinton told her unequivocally that "he didn't do it." Murphy's testimony bolstering her first statement made this impeachment evidence more believable. Blake also testified that Hinton told her, "[T]hey can't put me there or pull my prints off any gun or bullets." Without Murphy's testimony identifying Hinton as one of the shooters, this statement would have been consistent with Hinton claiming that he was falsely accused of this crime.

And if the jury did not believe Murphy, Robert Moore's account of Christian's alleged confession would likely also not be believed. Moore claimed that Christian confessed to committing the shooting exactly as Murphy described it happening in his November interview, and as recorded in the police reports Moore had access to before he came forward. That coincidence would have been far more salient if the jury disbelieved Murphy. And since neither the gun found at the gas station nor Ashlie Dye implicated Hinton or Edwards, if the jury did not believe Murphy, Moore's testimony would have been the only evidence linking Edwards to the crime. Similarly, only Moore's and Blake's testimony would have linked Hinton to the crime.

Finally, exculpatory evidence is material if it calls into question "the thoroughness and even the good

faith of the investigation . . . ." *Kyles*, 514 US at 445. The transcript of the October interview surely does. When Murphy came into the police station for his first interview, the police knew that a good friend of Person, Anthony Williams, told the police the day after the shooting that he had spent the afternoon and evening hanging out with Person until moments before the shooting. Williams did not mention Jarylle Murphy. And Murphy never mentioned Williams. Murphy's story contradicted Williams's, and yet the police never asked Murphy about Williams. And neither the police nor the prosecution ever contacted Williams again, despite his willingness to testify. Murphy's story also contradicted both Ashlie Dye's and Williams's accounts that Person was alone when he was shot. Murphy's story also contradicted Leroy Marks's testimony at trial that after hearing gunshots, he saw one boy running away from his bike before getting shot with no one else around. Yet the police "neither noted the inconsistencies nor questioned" Murphy about them. *Id*. at 427.

Murphy arrived at the police station with a detailed written description of the four shooters down to the color and brand of their shoes and the guns they carried, and yet told the police that he could not get a good look at them because it was "kinda dark," they were approached from behind, and the interaction happened in a matter of seconds. But the police failed to question Murphy about how he generated such a detailed description of the four men.

Murphy's version of events also was inconsistent with the physical evidence. In the suppressed interview, he had the time of the shooting wrong, said Person had been sitting on the sidewalk at the time of the shooting, claimed that Person did not have a bike,

that one of the shooters was on a bike, and that a girl was with them. But the bike was discovered right by Person's body, suggesting he had been riding or walking it at the time he was shot, not sitting on a sidewalk, and the police did not locate a girl who had been with Person during the shooting. Finally, none of the defendants' DNA matched the DNA recovered from the .380 caliber casings found at the scene—three other DNA profiles were identified on those casings.

Despite all these problems with Murphy's story, the prosecution built its case around it—and kept the most significant problems with his story from the defendants by providing them with a false and incomplete summary of his first interview instead of the transcript. The investigation reveals an "uncritical attitude" on the part of the police, *Kyles*, 514 US at 445, and the suppressed transcript "would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation," *id*.

Because we conclude the transcript is material, the defendants easily meet the standard for actual prejudice under MCR 6.508. Evidence is material if there is a " 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Chenault*, 495 Mich at 150, quoting *Bagley*, 473 US at 682. The standard for actual prejudice is strikingly similar; a defendant can show it where "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal[.]" MCR 6.508(D)(3)(b)(i)(A).

Given the centrality of Murphy's testimony and the strength of the suppressed impeachment evidence, we conclude that if the defendants had had access to the transcript, they would have had both a "reasonable probability" of a different result and at least a "reason-

ably likely chance of acquittal." *Chenault*, 495 Mich at 150; MCR 6.508(D)(3)(b)(i)(A).

III. CONCLUSION

The transcript is material because the defendants have demonstrated a reasonable probability that had it been disclosed, the result of the trial would have been different. It would have been powerful impeachment evidence of Murphy, the prosecution's central witness, making the defendants' argument that he was fabricating his story more likely. And if the jury did not believe Murphy, the other evidence would also be less believable. The state's suppression of the transcript calls the thoroughness and good faith of this investigation into question.

Because the transcript is material, the defendants were prejudiced by its suppression. But for the *Brady* violation, "the defendant[s] would have had a reasonably likely chance of acquittal[.]" MCR 6.508(D)(3)(b)(i)(A). Having established both good cause and actual prejudice, the defendants are entitled to a new trial.

BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with MCCORMACK, C.J.

CLEMENT, J. (*dissenting*). I respectfully disagree with the majority's decision to award new trials to defendants. While I agree with the majority that the prosecution's failure to provide defendants with the transcript of witness Jarylle Murphy's first interview with law enforcement constituted suppression of favorable evidence under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), I disagree that this evidence fulfills *Brady*'s materiality requirement such

that defendants are entitled to a new trial. Accordingly, I would deny defendants Kino Christian's and Joshun Edwards's applications for leave to appeal, and I would remand defendant C'Quan Hinton's case to the trial court for an evidentiary hearing on his ineffective-assistance-of-counsel claim.

I. FACTUAL BACKGROUND AND TRIAL

These cases arise from the fatal shooting of 14-year-old Robert Person on October 9, 2007, for which the prosecutor charged Christian, Joshun Edwards, Hinton, and Dartanion Edwards[1] with first-degree premeditated murder, assault with intent to murder, carrying a concealed weapon, and possession of a firearm during the commission of a felony.[2] Among the evidence introduced against defendants at trial was the testimony of Jarylle Murphy, who spent the hours preceding the murder with Person and witnessed the shooting. Because defendants argue that Murphy's testimony has been significantly undermined by the posttrial discovery of evidence withheld by the prosecution, a detailed review of both Murphy's testimony and the other evidence presented at trial is necessary.

According to Murphy's trial testimony, after basketball practice at a community center, he ran into his sister at a nearby bus stop and decided to accompany her to visit her uncle at Howard Estates. He estimated that they arrived at the uncle's home "probably around 4:30ish" and stayed for 30 to 45 minutes before walk-

[1] Dartanion Edwards was found guilty and sentenced to life in prison. Because he is not a party to this appeal, references to "Edwards" hereinafter are to Joshun Edwards, and "defendants" will refer only to Edwards, Hinton, and Christian.

[2] The prosecutor also charged both Christian and Edwards with being a felon in possession of a firearm.

ing to the Evergreen Regency Apartments, where Murphy's sister planned to meet some friends. Upon their arrival, Murphy's sister introduced him to Person, and the trio eventually went to Person's house for food. After "[m]aybe ten to 15 minutes at the most," Murphy's sister left. Murphy and Person thereafter walked around the apartment complex, where they were then approached by two individuals. According to Murphy, one of the individuals "asked [him] why was [he] with [Person] because [Person] was a snitch" and verbally confronted Person, "[b]asically telling him that they were going to get him and he was a snitch." At trial, Murphy identified the two individuals as defendants Christian and Hinton.

Murphy testified that after the confrontation, he and Person went to the store. En route, they were joined by a girl with whom Murphy was unfamiliar. They also came into contact with multiple people riding in a van, from whom Person retrieved an item—possibly a phone charger—and a bicycle before they departed. Murphy described the bicycle as "a mountain bike, gray and [he] believe[d] purple."

Murphy testified that later that evening—"after 7," as the sky "was in transition" between light and dark and "towards nighttime"—he and Person walked the unknown girl to another apartment complex. They spoke briefly, "for maybe five more minutes," at the front of the apartment complex before walking back toward the Evergreen Regency Apartments. As they approached the intersection of Lippincott Boulevard and Averill Avenue, Murphy noticed four men following them. He asked whether Person noticed them, and Person said no. Murphy looked back again, and "that's when [he saw] them, you know, pulling out the guns . . . ." Murphy alerted Person and fled. According

to Murphy, he "made it to around maybe about the corner" when he heard gunshots. Afterward, Murphy returned to the Evergreen Regency Apartments. He learned that Person had not survived the shooting when he saw the news on television later that evening.

According to Murphy, his grandparents eventually convinced him to disclose his involvement in the shooting to law enforcement, and he was voluntarily interviewed by law enforcement on October 16, 2007, one week after the shooting. Before the interview, Murphy expressed in writing detailed information about the shooters and their firearms based on his observations.[3] He would later testify at trial that, when the shooters were pursuing him and Person, the shooters were near and then underneath a streetlight and at a distance of "somewhere around" 35 to 50 feet away.[4] According to Murphy, the light, the distance, and his photographic memory allowed him to perceive and recall these

[3] At trial, Murphy read the following descriptions from his written statement regarding the shooters:

> Suspect number one, Jobos [sic: Girbauds], orange stripes, orange, white, navy blue hightop Forces, orange, white tee shirt, and a hoody. Suspect number two, blue jean pants, white tee shirt, all white Forces, black hoody. Suspect number three, gray Dickey's, black shirt, black Jordan's, do rag, and black and gray hat. Suspect number four, Jobos [sic], red stripes, black and red shirt, black and red Jordan's, black coat. Suspect number one, about 6'3" or 6'4", dark skin, peach fuzz, small mustache, brown eyes, short black wavy hair. Suspect number two, about 5'9" or 5'10", light or brown skin, short nappy hair, peach fuzz, light mustache, light brown eyes. Suspect number three, about 5'11" or 6', dark skin, black hair, long braids, goatee, sideburns, both ears were pierced. Suspect number four, about 5'6", brown skin, brown eyes, short even cut hair, stocky build.

[4] At trial, Murphy related the distance in terms of the courtroom, and counsel and the trial court estimated that distance to be 45 to 50 feet. At the preliminary examination, Murphy testified that the distance was 35 yards, but at trial he testified that he had meant feet, not yards.

details despite the short amount of time he viewed the shooters. From this information, Murphy was able to identify defendant Hinton from a photographic lineup during his October 16, 2007 interview and the remaining defendants during his November 8, 2007 interview.

At trial, each defendant's counsel thoroughly cross-examined Murphy about this narrative, including specific challenges to his identification of defendants as the shooters. After Murphy acknowledged having seen the shooters for only about five seconds, the cross-examiners pressed him on the details of his observations and thoroughly impeached his assertion that he had a photographic memory. Specifically, upon questioning, Murphy was unable to recall what clothing defendants Hinton and Christian were wearing when they initially confronted Person on the day of the shooting, and he was also unable to recall Hinton's and his defense counsel's clothing or facial hair from the previous day of trial. (In return, Murphy explained that his photographic memory encompasses only what he focuses on, and that colors and sometimes scenery are difficult to recall.) Further, Murphy struggled to match each defendant to the shooter descriptions he created before the October 16, 2007 interview. Finally, the defense also emphasized that Murphy's descriptions of the shooters came one week after the shooting, as Murphy fled the scene and did not give a statement to law enforcement on the evening of the shooting.

Defendants also challenged Murphy's testimony on the basis of inconsistencies between his trial testimony and earlier statements. The defense had in its possession a summary of Murphy's October 16, 2007 interview with law enforcement, a transcript of Murphy's November 8, 2007 interview with law enforcement, and the transcripts of Murphy's preliminary-

examination testimony. The defense demonstrated that, at the preliminary examination, Murphy had testified that Person's bicycle was purple, not purple and gray; they also elicited testimony from Murphy that he recalled the additional color at trial only after viewing the photograph of the bicycle admitted into evidence. The defense emphasized that Murphy had also previously testified that the shooters were, at closest, 35 yards away. When Murphy testified that he had meant "feet" rather than "yards," the defense elicited testimony regarding Murphy's football experience and argued that it was unbelievable for him to have mixed up the two units of length given that experience. Murphy had also previously testified at the preliminary examination that he saw two police vehicles as he fled from the shooting, in direct contrast to his testimony at trial that he heard sirens but did not see any police vehicles as he fled.[5]

In addition to Murphy's testimony, the prosecution introduced several other pieces of inculpatory evidence. Ashlie Dye, defendant Christian's former girlfriend, testified that she was driving in the area during the shooting and that a bullet hit her vehicle. Dye identified Christian as one of the shooters, and testified that he had apologized to her for her vehicle being shot. Robert Moore, a cellmate of Christian and defendant Edwards, testified that Christian admitted to

[5] The defense also noted that Murphy had testified repeatedly at the preliminary examination that he and Person did not go into the store; at trial, Murphy testified that he and Person went to the store before walking the unknown girl to her home. However, as the prosecution noted on redirect, Murphy's preliminary-examination testimony was given in the context of questions regarding what occurred once Person and Murphy realized they were being followed by the four individuals. Murphy did not testify at the preliminary examination that he and Person never went to the store on the evening in question.

murdering Person and that both defendants solicited Moore to murder Murphy on multiple occasions. Laquashia Blake, defendant Hinton's former girlfriend, testified that Hinton told her that "his Uncle Kino [Christian] did the murder and also got him involved in the situation." Monica McGee also testified that, on the night of the shooting, Hinton appeared nervous and later spoke to Christian on the phone regarding the media coverage of the shooting.

The prosecution also presented evidence regarding law enforcement's recovery of one of the firearms involved in the shooting. The firearm belonged to the girlfriend of William Harris, an acquaintance of defendants'. Although he later rejected this narrative at trial, Harris initially told the police that he had obtained the firearm from his girlfriend and gave it to Christian for the express purpose of murdering Person. Harris also averred that Christian bragged to him about being responsible for Person's murder. The firearm was recovered because of its involvement in a shooting a few days after Person's murder. During that shooting, Christian was a passenger in one of the two vehicles whose passengers shot at one another. Surveillance camera footage showed Christian hiding the firearm behind a gas station after the shooting. Detective Sergeant Ronald Ainslie of the Michigan State Police Department later matched four fired cartridges from the scene of Person's shooting to this firearm.

Defendants, for their part, maintained their innocence. In addition to challenging the credibility of the various witnesses against them, defendants also presented the testimony of various witnesses who observed Person walking alone on the day of the shooting. Defendants Christian and Edwards also pursued alibi defenses. Christian testified that, at the time of

the shooting, he had been selling drugs in an apartment; Edwards testified that, at the time of the shooting, he had been hanging out with friends in an apartment parking lot. Both defendants also posited that the persons responsible for Person's murder were actually Harris; a man known as "Pooh Bear"; and Perry Manuel, who had been involved in the October 13 shooting with Christian. Christian testified that the three men had been present with him at an apartment on the day of the shooting and, after receiving a phone call, had retrieved guns and left the apartment abruptly; upon their return, Manuel bragged about murdering Person. Defendants also emphasized that law enforcement did not identify "Pooh Bear" and never tested the DNA of these suspects against the DNA recovered from the scene.

At the close of trial, the jury found defendants guilty as charged. Defendants were unsuccessful on direct appeal. *People v Christian*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2011 (Docket Nos. 291578, 291687, and 291744), lv den 492 Mich 864 (2012) and 492 Mich 865 (2012).

II. MOTIONS FOR RELIEF FROM JUDGMENT AND PROCEDURAL HISTORY

Years after defendants' convictions, a relative of defendant Edwards requested and received documents related to his case from the Flint Police Department pursuant to Michigan's Freedom of Information Act, MCL 15.231 *et seq*. The documents revealed that a full transcript of Murphy's first interview with law enforcement on October 16, 2007, had been withheld from defendants. Instead, the defense had received a sum-

mary of the interview created by law enforcement—a summary defendants argue was incomplete and inaccurate.

Defendants moved for relief from judgment on the basis of the undisclosed transcript. They argued that the transcript contained favorable evidence insofar as it established inconsistencies in Murphy's statements that could have been used to impeach his testimony at trial and that its suppression therefore violated their constitutional due-process rights as established in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Specifically, defendants identified the following differences with Murphy's statements during the October 16, 2007 interview: the timing of the initial bus ride with his sister (at trial, sometime before their arrival at the uncle's home "around 4:30ish" and at the interview, "6:30"), the timing of the shooting (at the preliminary examination, "around 8:00", which was consistent with other testimony and the 911 call, and at the interview, around 9:00 or 9:30), the details regarding Person's encounter with defendants Christian and Hinton before the shooting (at the November 8, 2007 interview and preliminary examination, Christian and Hinton accused Person of snitching on a little brother, and at the interview, of snitching on a mother), whether the unknown girl was present during the shooting (at trial, she was not, and in the interview, she was), whether Person was on a bicycle at the time of the shooting (at trial, he was, and in the interview, he was not), and where Person and Murphy were at the time of the shooting (at trial, they were walking, and at the interview, they were sitting talking to the unfamiliar girl).

The trial court—which presided over defendants' entire trial, sentencing, and resentencing—ultimately

denied defendants' motions for relief from judgment, concluding that although the prosecution had failed to disclose favorable evidence to defendants before trial, the favorable evidence was not material and, therefore, reversal was not required. In so doing, the trial court reasoned that the inconsistencies between the October 16, 2007 transcript and Murphy's later statements were "minor at best" and that the defense had thoroughly cross-examined Murphy despite lacking the October 16, 2007 interview transcript. On appeal, the Court of Appeals agreed, emphasizing the inculpatory evidence presented at trial that was independent of Murphy's testimony.

Defendants subsequently applied for leave to appeal in this Court, and we issued an order to schedule oral argument on the applications and directing the parties to address "whether the lower courts erred by holding that the suppressed October 16, 2007 interview transcript was not material to their guilt such that they were not entitled to relief under *Brady v Maryland*, 373 US 83, 87 (1963), and *People v Chenault*, 495 Mich 142, 149-150, 155 [845 NW2d 731] (2014)." *People v Christian*, 507 Mich 952, 952 (2021).

III. *BRADY* ANALYSIS

In order to succeed on a *Brady* claim, a defendant must prove that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *Chenault*, 495 Mich at 150. Whether the prosecution's suppression occurred in bad faith is irrelevant to the inquiry. *United States v Agurs*, 427 US 97, 110 & n 17; 96 S Ct 2392; 49 L Ed 2d 342 (1976). Notably, the prosecution's duty to disclose favorable evidence includes all favorable evidence held by other government actors, including law enforcement. *Kyles v*

Whitley, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995); *People v Dimambro*, 318 Mich App 204, 213; 897 NW2d 233 (2016). Further, both substantive exculpatory evidence and impeachment evidence are considered favorable evidence for purposes of the *Brady* inquiry. *Turner v United States*, 582 US 313, 323-324; 137 S Ct 1885; 198 L Ed 2d 443 (2017).

I agree with the majority that the first two prongs of the *Brady* inquiry are met here. The prosecution failed to turn over the October 16, 2007 transcript of Murphy's first interview with law enforcement to defense counsel before trial, and that transcript contained favorable evidence insofar as it contained inconsistencies with Murphy's other statements. However, I disagree with the majority regarding the materiality of the October 16, 2007 interview transcript. In order to demonstrate that a piece of evidence is material, a defendant must

> show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v Bagley*, 473 US 667, 682; 105 [S Ct] 3375; 87 L Ed 2d 481 (1985). This standard "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 US at 434. The question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. In assessing the materiality of the evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal. [*Chenault*, 495 Mich at 150-151.]

Further, while impeachment evidence can be material under *Brady*, see *Wearry v Cain*, 577 US 385; 136 S Ct

1002; 194 L Ed 2d 78 (2016), its materiality in any particular case is dependent on the extent of the impeachment and the strength of the other evidence presented, see *Agurs*, 427 US at 112-113; *Smith v Cain*, 565 US 73, 76; 132 S Ct 627; 181 L Ed 2d 571 (2012). See also *People v Salazar*, 35 Cal 4th 1031, 1050; 112 P3d 14 (2005) ("In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant(s) to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.") (quotation marks and citations omitted).

I believe that the impeachment evidence contained in the October 16, 2007 interview transcript is not material under *Brady* because its impeachment value is limited and because other inculpatory evidence admitted at trial corroborated defendants' guilt. Defendants identify several inconsistencies between the October 16, 2007 transcript and Murphy's other statements, but many do not present new avenues for impeachment. For example, the October 16, 2007 transcript indicates that Murphy had previously been less certain about his identification of defendants than his trial testimony would suggest." But defendants were aware of Murphy's uncertainty. In the November 8, 2007 interview transcript, Murphy stated that he "couldn't see [the shooters] really good" and that "[a]ll I did was turn around and take a glance." And Murphy testified similarly at the preliminary examination that he had had "less than a minute," perhaps "20 to 15 seconds," to view the approaching shooters. These statements were substantially similar to Murphy's statements from the October 16, 2007 interview that he could "[n]ot really" see the shooters' faces clearly because "it was kinda dark" and that he would likely

recognize the faces of the two shooters who had initially confronted him and Person but "[p]robably not" the other two.[6] Given the substantial similarity of Murphy's previous statements to the October 16, 2007 transcript, the October 16, 2007 transcript would not have added a new avenue for impeachment by the defense. With the information it was supplied from the November 8, 2007 interview and preliminary examination, the defense elicited testimony from Murphy regarding the brief time he was able to observe the shooters, and the defense successfully challenged Murphy's claim of having a photographic memory through demonstrations of Murphy's failure to recall appearances and outfits from trial and the day of the shooting. The addition of the October 16, 2007 interview transcript to this issue would not have introduced a new avenue for impeachment, and it would not have greatly increased the strength of the impeachment evidence that did exist such that the jury might have found Murphy's testimony identifying defendants as the shooters incredible.

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[6] Specifically, the exchange between Murphy and Sergeant Lee Ann Gaspar was transcribed as follows:

> *Sergeant Gaspar*: Would you know their faces if you saw them again?
>
> *Murphy*: Possibly.
>
> *Sergeant Gaspar*: Yes?
>
> *Murphy*: Yes.
>
> *Sergeant Gaspar*: Yes or no?
>
> *Murphy*: Probably not the other two suspects.
>
> *Sergeant Gaspar*: But the original two. Okay. The one that did all the talking?
>
> *Murphy*: Yeah.

There is other impeachment evidence within the October 16, 2007 interview transcript that potentially would have presented new avenues for impeachment by the defense, including what time Murphy left the community center, the motive for the initial confrontation with defendants Christian and Hinton, what time the shooting occurred, whether the unknown girl was present during the shooting, whether Person was on a bicycle at the time of the shooting, and whether Person and Murphy were sitting or standing at the time of the shooting.[7] However, I would emphasize that these new avenues for impeachment are still of a similar charac-

[7] I note that some of these inconsistencies are somewhat unclear and, had they been presented at trial, are likely to have been cured by redirect examination. For example, the majority argues that the October 16, 2007 interview transcript establishes an inconsistency regarding Murphy's description of the initial confrontation between two of the shooters and Person. The majority notes that, in the October 16, 2007 interview, "Murphy said that one of the men [who initially confronted Person] accused Person of snitching on his mom—unlike his later accounts, where he says one of the men accused Person of snitching on his brother." This is true—Murphy reported that one of the men who confronted Person asked him, "You the dude that snitched on my moms?" and commented, "My moms don't play with no snitches." However, in the same interview, Murphy also expanded that "[Person] was around when this dude got caught with the weed . . . [and] [t]hey said he snitched on the dude that got caught with the weed." Although Murphy's reference to a mother is unique to the October 16, 2007 interview, Murphy does refer to a man who was allegedly snitched on because of a marijuana sale, which is consistent with his later statements. Accordingly, this statement is not irreconcilable with Murphy's later statements. The majority also argues that the October 16, 2007 interview transcript shows that Murphy previously stated that the unknown girl was present at the shooting, but a more thorough review of the transcript shows that Murphy was somewhat ambivalent about that fact. He stated at the beginning of the interview that the girl was not there when the shooting started, but he later answered "I think so" when asked whether the girl was there for the shooting. While these pieces of the October 16, 2007 transcript present avenues for impeachment, given their ambiguity, their value is low.

ter as those that were presented at trial (i.e., asserting that Murphy's narrative of events and identification were false because Murphy was not consistent in his reiteration of the shooting). The October 16, 2007 interview does not, for example, offer evidence that Murphy was not credible for other reasons, like that Murphy was testifying in exchange for leniency in a pending case or that other evidence demonstrates that Murphy's narrative was impossible. See, e.g., *Napue v Illinois*, 360 US 264, 270; 79 S Ct 1173; 3 L Ed 2d 1217 (1959) (wherein a witness's attempt to obtain a plea deal before testifying was material).

Moreover, I am unconvinced that these inconsistencies—even combined with the cumulative impeachment evidence described earlier—would have materially undermined Murphy's identification of defendants. Murphy's repeated recollections of the shooting are not identical, but inconsistencies are common in eyewitness testimony and do not necessarily render evidence of those inconsistencies material. See, e.g., *Chenault*, 495 Mich at 157-158 (finding that minor discrepancies in the identification of a shooter in different interviews did not undermine the identification). Murphy's narrative of the event was largely consistent each time he gave it, including the chronology of his movements on the day in question and the descriptions of the shooters. Each time Murphy reiterated his narrative, he described traveling from the community center with his cousin, visiting an uncle's home, meeting Person, wandering around the neighborhood, being confronted by two men regarding snitching and gang affiliations, and being chased and shot at by four persons later on in the evening. The inconsistencies identified by defendants appear to be the result of frailties in human recall, not organized mistruths. Accordingly, I cannot conclude that these

minor inconsistencies present in the October 16, 2007 interview transcript would significantly affect Murphy's credibility given his otherwise consistent narrative. Further, none of the inconsistencies presented in the October 16, 2007 interview transcript would cast new light on the strength of Murphy's identifications of defendants as the shooters (for defendant Hinton, at the October 16, 2007 interview, and for the remainder of defendants, at the November 8, 2007 interview). And while the defense did not have access to the October 16, 2007 interview transcript at trial, it is worth noting that defense counsel challenged Murphy's credibility at trial—specifically regarding his identification of defendants and narrative of events—and the jury nonetheless found Murphy to be credible.

Moreover, significant other inculpatory evidence was presented at trial that corroborated Murphy's narrative. That inculpatory evidence included defendant Christian's possession of a weapon involved in the shooting about one week later, Christian's ex-girlfriend and witness to the shooting placing Christian at the scene of the shooting, Christian apologizing to her after the crime, Christian and defendant Edwards repeatedly soliciting their cellmate to murder Murphy, Christian admitting to his cellmate and to another acquaintance that he murdered Person, defendant Hinton stating to his former girlfriend that "his Uncle Kino [Christian] did the murder and also got him involved in the situation," and Hinton and Christian's suspicious phone call on the evening of the shooting. This inculpatory evidence is independent of Murphy's testimony and is unaffected by the October 16, 2007 transcript's potential for impeachment. And although the inculpatory evidence is independent of Murphy's testimony, it does also bolster Murphy's narrative. Notably, the trial judge, who personally and directly observed the admis-

sion of this evidence as well as Murphy's testimony and therefore is better suited to judge Murphy's credibility, concluded that the withholding of the evidence contained within the October 16, 2007 interview did not undermine confidence in the jury's verdict. See *People v Lemmon*, 456 Mich 625, 650 n 5; 576 NW2d 129 (1998) (M. F. CAVANAGH, J., concurring) ("The judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.") (quotation marks and citation omitted). On this record, I cannot say that the trial judge's conclusion fell outside the range of reasonable and principled outcomes.[8]

In sum, I believe that the October 16, 2007 interview transcript would not "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 US at 435. Accordingly, I would not award defendants new trials on this basis.

IV. DEFENDANT HINTON'S ADDITIONAL CLAIM

In addition to his *Brady* claim, defendant Hinton also argues that his trial counsel rendered ineffective assistance of counsel by failing to call two alibi witnesses, Joanna Tedford and Anthony Williams. At trial, Hinton argued that he was not involved in or present at the shooting and had instead been at Tedford's apartment. In support of that alibi, defendant Edwards testified that he saw Hinton in the parking lot

[8] "This Court reviews a trial court's decision regarding a motion for relief from judgment for an abuse of discretion." *People v Washington*, 508 Mich 107, 130 n 9; 972 NW2d 767 (2021). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted).

near Tedford's apartment between 7:45 p.m. and 11:00 p.m. Additionally, Mickey Jones testified that he saw Hinton leave Tedford's apartment at some point after the shooting. However, the shooting occurred around 8:00 p.m., and neither of these witnesses could testify as to whether Hinton was at Tedford's apartment at this exact time. And despite having filed an alibi notice before trial identifying Tedford herself as a witness, defense counsel never called Tedford. Hinton now asserts that Tedford would have testified that he was present in her apartment during the shooting. Regarding the potential testimony of Williams, Hinton argues that Williams would have testified, contrary to Murphy's testimony, that Williams was with Person until shortly before the shooting and that Murphy had not been present.

Both the United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To demonstrate ineffective assistance of counsel, a defendant must (1) " 'show that counsel's performance was deficient,' " and (2) " 'show that the deficient performance prejudiced the defense.' " *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In proving deficient performance, defense counsel's actions are measured against an objective standard of reasonableness, *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995), and the defendant must overcome "a strong presumption of effective counsel when it comes to issues of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). If a defendant shows that defense counsel's performance fell below an objective standard of reasonableness, the defendant must then "show the existence of a reasonable probability"

that, but for this deficient performance, "the result of the proceeding would have been different." *Carbin*, 463 Mich at 600.

Hinton raised this ineffective-assistance-of-counsel claim within a motion for relief from judgment. Generally speaking, a defendant may not raise in a motion for relief from judgment "grounds for relief which were decided against the defendant in a prior appeal . . . ." MCR 6.508(D)(2). Further, if a defendant could have raised the issue on direct appeal, but did not, the defendant must establish "good cause" for the failure to do so, as well as "actual prejudice." MCR 6.508(D)(3). To demonstrate "actual prejudice," a defendant must show that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal[.]" MCR 6.508(D)(3)(b)(i).

The Court of Appeals rejected Hinton's claim, reasoning with regard to Tedford that appellate counsel had previously raised this claim on direct appeal—thus barring consideration under MCR 6.508(D)(2)—and that Tedford's testimony was superfluous because Hinton's alibi was established through the testimony of Jones and defendant Edwards instead. The Court of Appeals found Hinton's argument with regard to Williams similarly meritless, reasoning that Williams's testimony would not have challenged the prosecution's witnesses.

I disagree, and I would have remanded for an evidentiary hearing to further develop the factual record on this argument. Although defense counsel on direct appeal did technically raise an ineffective-assistance-of-counsel argument as to Tedford, Hinton makes a convincing argument that defense counsel's performance in that matter was deficient. Defense counsel initially moved for a remand in the Court of

Appeals, but failed to identify any particular deficiency for which factual development was required. Accordingly, the motion was denied. Defense counsel subsequently filed a supplemental brief with more thorough argument, but failed to renew the motion to remand. Under these circumstances, I do not believe the procedural bar of MCR 6.508(D)(2) should apply.

Further, although Hinton's alibi that he was at Tedford's apartment at the time of shooting was generally supported by Jones's and Edwards's testimony, neither of these witnesses testified as to where Hinton was at the exact time of the shooting. Although the witnesses could place him generally near Tedford's apartment on the evening in question, their testimony did not conclusively establish Hinton's whereabouts at the time of the shooting. Tedford's testimony may provide the specificity that the testimony elicited from Jones and Edwards at trial lacked. Williams's proposed testimony—that he was with Person in the time leading up to the shooting—may also be probative of Hinton's involvement in the shooting. Given that the additional inculpatory evidence presented at trial was arguably weakest against Hinton as compared to his fellow defendants, it is also possible that Hinton could succeed in proving that he received deficient performance of counsel and that the deficiency prejudiced him.

To be clear, I express no opinion regarding whether Hinton should receive relief pursuant to his ineffective-assistance-of-counsel argument. However, considering the circumstances of the direct appeal, I believe Hinton has made a sufficient offer of proof to warrant an evidentiary hearing to further develop the record.

V. CONCLUSION

Although the prosecution in this case failed to disclose Murphy's October 16, 2007 interview transcript to defendants before trial, there is not a reasonable probability that, had defendants received this evidence, the trial result would have been different. Accordingly, I disagree with the majority's conclusion that the withheld evidence was material, and I would not grant new trials to defendants. I would, however, remand for an evidentiary hearing to further explore defendant Hinton's ineffective-assistance-of-counsel argument.

ZAHRA and VIVIANO, JJ., concurred with CLEMENT, J.

PEOPLE v TAYLOR

Docket No. 154994. Argued on application for leave to appeal March 3, 2022. Decided July 28, 2022.

Robert Taylor was convicted following a jury trial in the Macomb Circuit Court of first-degree felony murder, MCL 750.316(1)(b); carjacking, MCL 750.529a; conspiracy to commit carjacking, MCL 750.529a and MCL 750.157a; kidnapping, MCL 750.349; conspiracy to commit kidnapping, MCL 750.349 and MCL 750.157a; and possession of a firearm during the commission of a felony, MCL 750.227b. In 2009, defendant and his codefendant, Ihab Masalmani, abducted Matt Landry from outside a sandwich shop. Defendant acted as the lookout while Masalmani forced Landry into Landry's car. The two then drove Landry away at gunpoint. Defendant and Masalmani held Landry against his will for several hours and stole money from his bank account during that time; Landry was later killed by a gunshot wound to the head. The prosecutor proceeded at trial under the theory that defendant aided and abetted Masalmani in the crimes. The jury found defendant guilty of the charged offenses. The court, Diane M. Druzinski, J., sentenced defendant to a mandatory term of life in prison without the possibility of parole (LWOP) for the felony-murder conviction. In an unpublished per curiam opinion issued on March 21, 2013 (Docket No. 303208), the Court of Appeals, JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ., affirmed defendant's convictions but remanded for resentencing in light of the United States Supreme Court's ruling in *Miller v Alabama*, 567 US 460 (2012), which struck down as unconstitutional mandatory LWOP sentences for juveniles. On remand, the prosecutor moved under MCL 769.25—a statute enacted by the Legislature in response to *Miller*—to have defendant resentenced to LWOP. Following a hearing during which the court reviewed the *Miller* factors, the court again sentenced defendant to LWOP. In an unpublished opinion issued September 22, 2016 (Docket No. 325834), the Court of Appeals, BORRELLO, P.J., and MARKEY and RIORDAN, JJ., affirmed defendant's sentence. Defendant sought leave to appeal in the Supreme Court, and his application was held in abeyance at various times pending decisions in *People v Hyatt* 502 Mich 89 (2018); *People v Masalmani* 505 Mich 1090

(2020); and *Jones v Mississippi*, 593 US ___; 141 S Ct 1308 (2021). After those cases were resolved, the Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other action. 508 Mich 938 (2021).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

When a prosecutor seeks to impose LWOP under MCL 769.25 for a crime committed when the defendant was a juvenile, the prosecutor bears the burden to rebut a presumption that LWOP is a disproportionate sentence. The standard for rebuttal is clear and convincing evidence. In this case, defendant was entitled to resentencing because the trial court was not operating within that framework. However, because the Court of Appeals failed to address a separate issue that could be dispositive, the case first had to be remanded to the Court of Appeals for consideration of that issue.

1. The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishments, guaranteeing individuals the right not to be subjected to excessive sanctions. Further, a basic precept of justice requires that punishment be proportionate to both the offense and the offender. The United States Supreme Court has thus held that juvenile offenders are constitutionally different from adult offenders for purposes of sentencing—they are less deserving of the most severe punishments because of their diminished culpability and increased prospects for reform. In *Miller*, therefore, the United States Supreme Court held that the Eighth Amendment prohibits mandatory LWOP sentences for crimes committed when the offender was under 18 years old. *Miller* also set forth factors that a trial court should consider before concluding that it is appropriate to sentence a juvenile offender to die in prison for a homicide offense. Those factors are: (1) the juvenile's chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's family and home environment; (3) the circumstances of the homicide offense, including the extent of the juvenile's participation in the conduct and the way familial and peer pressures may have affected the juvenile; (4) the incompetencies of youth, which affect whether the juvenile might have been charged with and convicted of a lesser crime, for example, because the juvenile did not have the capacity to assist their attorney in their own defense; and (5) the juvenile's possibility of rehabilitation. These factors

have been expressly incorporated into this state's discretionary juvenile LWOP sentencing scheme under MCL 769.25.

2. Under MCL 769.25, if a defendant who was less than 18 years old at the time of their crime is convicted of certain enumerated offenses, including first-degree murder, the prosecutor may file a motion seeking to have the defendant sentenced to LWOP. The motion must specify the grounds on which the prosecutor is requesting that sentence, and the defendant has 14 days to respond. After that, the court must conduct a hearing on the motion during which it must consider the *Miller* factors and may consider any other relevant criteria. Next, the court must specify on the record the aggravating and mitigating circumstances that it considered and the reasons supporting the sentence imposed. If the court decides not to sentence the defendant to LWOP, it must sentence the defendant to a statutory term of years. Although MCL 769.25 does not specify the standard of proof, the burden of proof is generally assigned to the party who seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion. Under MCL 769.25, a sentence of LWOP can be imposed only if the prosecutor files a motion. This motion requirement is meaningful. Under MCL 769.25, the status quo is that a juvenile defendant will be sentenced to a term of years. If the prosecution seeks to change the status quo by filing a motion to impose LWOP, it becomes the moving party and must bear the burden and risk of nonpersuasion at the *Miller* hearing.

3. If the prosecutor seeks to have a juvenile offender sentenced to LWOP pursuant to MCL 769.25, it is the prosecutor's burden to overcome the presumption that LWOP is disproportionate. The most important consideration in the creation of presumptions is probability. A steady line of precedent from the United States Supreme Court could not be clearer—persons under 18, as a group, are less culpable than adults, more prone to outside influence, more likely to be rehabilitated, and less deserving of the most severe punishments. As a procedural mechanism, therefore, it makes sense for sentencing courts to start from the premise that the juvenile defendant before them, like most juveniles, has engaged in criminality because of transient immaturity, not irreparable corruption. In other words, it is probable that the juvenile offender standing before the court possesses those attributes of youth that diminish the penological justifications for imposing the harshest sentences available under Michigan law.

4. The standard of proof serves to allocate the risk of error between litigants and reflects the relative importance attached to a decision. When the Legislature is silent on the standard of proof, the courts must prescribe one. The United States Supreme Court has explained that proof by clear and convincing evidence is appropriate when particularly important individual interests or rights are at stake. Considering the important Eighth Amendment right at stake in comparison to the fact that juvenile LWOP is not categorically barred in Michigan, the prosecutor must prove facts and circumstances that rebut the presumption against LWOP by clear and convincing evidence.

5. The trial court must consider all the evidence before it and determine whether the presumption has been rebutted by clear and convincing evidence in order to impose LWOP. This is an exercise in discretion, not a fact-finding mission. MCL 769.25 does not require the sentencing court to find any particular fact before it can impose LWOP. It is true that in *People v Skinner*, 502 Mich 89 (2018), the Court wrote that neither *Miller* nor *Montgomery* imposes a presumption against LWOP for those juveniles convicted of first-degree murder on either the trial court or the appellate court. But the central holding in *Skinner* was that *Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility. Whether a presumption against LWOP for juvenile offenders exists was irrelevant to the outcome of the case, so this statement was nonbinding dictum. Moreover, *Skinner* was interpreting what the federal *Constitution* requires while this case concerned what the *statute* requires and how sentencing courts should implement the statute. The decision in this case does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if the sentencing court determines that, considering all the information before it, LWOP is a constitutionally proportionate sentence. In this case, defendant was entitled to resentencing because the trial court was not operating within the correct framework for implementing MCL 769.25 when it resentenced defendant.

6. In his Court of Appeals brief, defendant argued that his sentence violated the Eighth Amendment and Article 1, § 16 of Michigan's Constitution, which prohibits cruel or unusual punishment, because he was convicted of felony murder as an aider and abettor. The Court of Appeals failed to address this issue, so the case had to be remanded to that Court for consideration of that potentially dispositive issue before any resentencing.

Reversed and remanded.

Chief Justice MCCORMACK, joined by Justices BERNSTEIN and CAVANAGH, concurring, wrote separately to explain why she believed the trial court abused its discretion in applying the *Miller* factors when sentencing defendant. The first *Miller* factor requires considering the juvenile offender's chronological age and its hallmark features. These hallmark features include immaturity, impetuosity, and failure to appreciate risks and consequences. Defendant was 16 years and 10 months old at the time of the offense. The trial court noted that the juvenile offenders in *Miller* were roughly two years younger and that defendant's underdeveloped prefrontal cortex would not be much more undeveloped than that of an 18 year old. But a juvenile offender need not be the same age as those in *Miller* to receive the benefit of the *Miller* decision. Proximity to age 18 can affect the *extent* of the mitigation, but proximity to age 18 is emphatically not an aggravating factor. The trial court also concluded that because an 18 year old could not benefit from the brain science presented at the resentencing hearing, neither should a 16-year-old defendant. This was also error. *Miller* requires that juveniles under 18 are to be treated, categorically, as having diminished culpability. That the Eighth Amendment might not require the same for similarly situated 18-year-olds is not constitutionally relevant. The next *Miller* factor is the juvenile's family and home environment. Juveniles subjected to trauma, abuse, and neglect are more vulnerable to outside influences than ordinary teenagers and suffer from cognitive underdevelopment, lack of maturity, and decreased ability to restrain impulses. The trial court here concluded from the evidence that defendant's family environment was "far from optimal" but determined only that this factor "could arguably favor some leniency or lessening of culpability for defendant." Justice MCCORMACK agreed with the trial court that defendant's home environment was "far from optimal" but disagreed that it only *arguably* favored leniency; juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their environment. The third *Miller* factor is the circumstances of the homicide offense, including the extent of the juvenile's participation and the way familial and peer pressures may have affected the juvenile. The trial court found that this factor weighed in favor of LWOP. The court noted that there was no evidence that defendant did not expect the murder to occur, that he attempted to remove himself from the situation, or that he tried to dissuade his codefendant. As much as the trial court believed that defendant's failure to stop his codefendant's conduct, or at least to walk away from it, was evidence against mitigation, *Miller* says otherwise. Juveniles make rash decisions,

cannot assess consequences, and are often unable to extricate themselves once criminal situations are set in motion. Finally, the trial court did not address the fact that defendant was convicted of felony murder, not premeditated murder, and as an aider and abettor, not as the principal offender; nor did it address that defendant did not pull the trigger and may not have even been present when the victim was killed. The trial court did not reconcile how both defendant and his older codefendant—who killed the victim—could each be the truly rare juvenile offender deserving of LWOP given their differing conduct. Regarding the next *Miller* factor, the trial court found that there was no evidence that the incapacities of youth hurt defendant's ability to participate in preparing his defense or led him to implicate himself to the authorities. Thus, it found that "this factor favors sentencing defendant to life without the possibility of parole." That is, this factor was aggravating, not mitigating. The trial court's finding was clearly erroneous. *Miller* did not suggest that a juvenile offender is more deserving of LWOP if the offender is better able to participate in their defense. If a defendant's youth hindered their ability to successfully navigate the criminal justice system, that fact is mitigating. If a defendant's youth did not hinder their ability, this factor is neutral. The final *Miller* factor is the possibility of rehabilitation. The trial court found that defendant's "far from optimal" home environment—the only factor that the court found weighed against a sentence of LWOP—also showed that defendant's prospects for rehabilitation were minimal, supporting LWOP. The court's analysis was backward. Because there was no evidence that defendant could *not* be rehabilitated, there was no reason to conclude that defendant, like the great majority of youths, lacked the capacity to change and mature. Requiring a defendant to prove that they fall into the general category of adolescents would turn *Miller* upside down. The trial court erred by finding that defendant's family environment was mitigating under one *Miller* factor but that the same finding discounted the mitigation of another *Miller* factor. Childhood trauma, neglect, and abuse will always pose a challenge for a juvenile's rehabilitation. But the Supreme Court views a difficult upbringing as a mitigating factor, not as evidence of impossible rehabilitation. The trial court's contrary assessment was error.

Justice VIVIANO, joined by Justices ZAHRA and CLEMENT, dissenting, stated that the majority was using this brutal kidnapping and murder case as an opportunity to drastically limit the discretion sentencing courts have traditionally held to impose a sentence on a defendant convicted of one of our state's most

serious crimes. The majority announced a presumption against imposing LWOP on juveniles who commit the crime of murder, ignoring *Skinner*, in which the Court declined to recognize such a presumption only a few years ago. The requirement that the prosecution must file a motion requesting an LWOP sentence is only a condition precedent, not evidence of a presumption. The majority then announced that the prosecution bears the burden of rebutting this presumption, despite the fact that no such burden exists in MCL 769.25. Instead, the statute imposes an unqualified requirement that the trial court consider the *Miller* factors and exercise its discretion to impose either a term-of-years sentence or an LWOP sentence. Justice VIVIANO would have concluded that neither party has the burden of proving to the sentencing court how it should weigh an individual *Miller* factor. From a practical standpoint, a no-burden standard makes good, common sense. The *Miller* factors are not aggravating factors. Therefore, a prosecutor who is seeking an LWOP sentence has no incentive to present evidence regarding the *Miller* factors. It is the defendant who has the incentive to present mitigating evidence. The majority's holding was not supported by the statute and conflicted with caselaw; its rewriting of the statute also raised serious separation-of-powers concerns. Justice VIVIANO would have instead applied the abuse-of-discretion standard and held that the trial court did not abuse its discretion by resentencing defendant to LWOP. The trial court in this case carefully considered and applied each of the *Miller* factors in a lengthy, written opinion, finding that all but defendant's home and family environment favored sentencing defendant to LWOP. It was well within the range of principled outcomes for the trial court to sentence defendant to LWOP. Absent from the majority's opinion was any recognition of the enormous cost the Court imposed on the victim's family and friends by once again requiring them to relive this tragic crime at yet another resentencing, and the Court offered no hope for closure some 13 years after the heinous crime was committed because the trial judge would again have to attempt to fashion a sentence in search of the ever-elusive blessing of the majority. Rather than changing how trial courts sentence juveniles facing LWOP, Justice VIVIANO would have remanded this case to the Court of Appeals for it to address the issue it did not address on direct appeal—whether defendant's sentence violated the Eighth Amendment and Const 1963, art 1, § 16—but he would have otherwise affirmed the Court of Appeals judgment.

CRIMINAL LAW — JUVENILES — HOMICIDE — SENTENCING — LIFE IN PRISON WITHOUT PAROLE — PRESUMPTION THAT LIFE WITHOUT PAROLE IS DISPROPORTIONATE — BURDEN OF PROOF TO REBUT THE PRESUMPTION.

When a prosecutor seeks to impose a sentence of life in prison without parole (LWOP) under MCL 769.25 for a crime committed when the defendant was a juvenile, the prosecutor bears the burden to rebut a presumption that LWOP is a disproportionate sentence; the standard for rebuttal is clear and convincing evidence.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Peter Lucido*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Emil Semaan* for the people.

Warner Norcross + Judd LLP (by *Conor B. Dugan*) for defendant.

Amici Curiae:

Bonsitu Kitaba-Gaviglio, *Daniel S. Korobkin*, and *Tessa B. Bialek* for Juvenile Law Center, American Civil Liberties Union of Michigan, and Juvenile Sentencing Project.

Friedman Legal Solutions, PLLC (by *Stuart G. Friedman*) for Criminal Defense Attorneys of Michigan.

Kimberly Thomas for University of Michigan Juvenile Justice Clinic.

CAVANAGH, J. This case presents us with a vehicle to provide much-needed guidance to criminal defendants, prosecutors, and trial courts on the proper procedure for conducting MCL 769.25 sentencing hearings when a prosecutor seeks to impose a sentence of life without parole (LWOP) for a crime committed when the defendant was a juvenile. We hold that, as the moving party

at a *Miller*[1] hearing, the prosecutor bears the burden to rebut a presumption that LWOP is a disproportionate sentence. The standard for rebuttal is clear and convincing evidence. In this case, the trial court was not operating within the framework we set forth today. Defendant is therefore entitled to resentencing. Because the Court of Appeals failed to address a separate constitutional issue that could be dispositive, however, we remand this case to the Court of Appeals to consider that issue in the first instance before any resentencing can take place.

I. FACTS AND PROCEDURAL HISTORY

There is no denying that the facts of this case are heinous. The victim, Matt Landry, was brazenly abducted in broad daylight from outside an Eastpointe sandwich shop by defendant, Robert Taylor, and codefendant, Ihab Masalmani. Armed with a gun, defendant, who was 16 years old at the time, acted as a lookout while 17-year-old Masalmani forced Landry into Landry's own car; the two then drove Landry away at gunpoint. The pair held Landry captive over the next several hours, drove his vehicle around, and stole money from his bank account. Eventually, while continuing to hold Landry captive, the pair made their way into the city of Detroit to purchase crack cocaine. The victim was last seen alive inside a vacant drug house. A few days later, Landry's body was discovered inside a burned-out house in Detroit. He had been shot in the back of the head, execution style.[2]

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[1] *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

[2] Following trial, Masalmani admitted responsibility for Landry's murder and indicated that defendant was not present when he was killed.

Defendant and Masalmani were arrested and tried before separate juries in connection with these criminal actions.[3] The prosecutor's theory at trial was that defendant aided and abetted Masalmani. Following trial, a jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b); carjacking, MCL 750.529a; conspiracy to commit carjacking, MCL 750.529a and MCL 750.157a; kidnapping, MCL 750.349; conspiracy to commit kidnapping, MCL 750.349 and MCL 750.157a; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant received the mandatory sentence of LWOP for his first-degree murder conviction. On appeal, the Court of Appeals affirmed in an unpublished per curiam opinion.[4] However, in light of the then-recent United States Supreme Court case, *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), which struck down mandatory LWOP

[3] For his part in the above-described crimes, Masalmani was convicted of first-degree felony murder, carjacking, conspiracy to commit carjacking, kidnapping, conspiracy to commit kidnapping, larceny from a person, and possession of a firearm during the commission of a felony (felony-firearm). *People v Masalmani*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2013 (Docket Nos. 301376; 301377; 301378), p 1. In addition to the kidnapping and murder of Matt Landry, however, Masalmani continued on a lone crime spree, resulting in the initiation of two additional criminal cases. *Id*. at 1-2. One of the cases involved two counts of armed robbery, one count each of kidnapping and bank robbery, and four counts of felony-firearm. *Id*. The other involved carjacking, receiving or concealing a firearm, and felony-firearm. *Id*. at 2. Masalmani's three criminal cases were consolidated for trial. *Id*. at 1. Because defendant did not participate in the acts giving rise to the second and third criminal cases, his charges pertaining to the kidnapping and murder of Matt Landry were severed from Masalmani's and tried before a separate jury.

[4] *People v Taylor*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2013 (Docket No. 303208), pp 1, 8.

sentences for juveniles, the Court of Appeals vacated his sentence and remanded for resentencing.[5]

As will be discussed in greater detail, in response to *Miller*, the Michigan Legislature enacted MCL 769.25.[6] In accordance with that statute, the prosecutor moved to have defendant sentenced to LWOP. MCL 769.25(2). As required by MCL 769.25(6), the trial court held a *Miller* hearing over the course of two days in October 2014. The trial court heard testimony from Kathleen Schaefer, a licensed professional counselor and associate professor qualified as an expert in parole and probation. Schaefer had met with defendant in prison and expressed a belief that defendant was capable of change and rehabilitation, although she admitted there was no predictive "test" that could indicate whether a person was capable of rehabilitation or not. The parties also stipulated to the admission of the report and testimony of Dr. Daniel Keating, a professor of psychology, psychiatry, and pediatrics, who was qualified as an expert in cognitive brain development in adolescents.[7] Keating's testimony concerned scientific generalizations surrounding adolescent brain development. Following the hearing, the trial court took the matter under advisement.

On January 6, 2015, the trial court issued an order and opinion sentencing defendant to LWOP. In its

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[5] *Id*. at 7-8. Codefendant Masalmani's case was also remanded for resentencing for the same reason. *Masalmani*, unpub op at 7.

[6] The Legislature correspondingly enacted MCL 769.25a, creating a resentencing procedure in response to *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016), which held that *Miller* was to be applied retroactively. Because defendant's case was still on direct appeal, MCL 769.25 is the relevant provision in this case.

[7] Keating testified before the same judge at codefendant Masalmani's *Miller* hearing two days before defendant's *Miller* hearing. He did not personally meet with either juvenile.

opinion, the trial court went through each *Miller* factor and determined that LWOP was an appropriate sentence, characterizing defendant as a " 'rare juvenile offender whose crime reflects irreparable corruption.' " (Citation omitted.) Defendant again sought leave to appeal, and the Court of Appeals again affirmed in an unpublished per curiam opinion. *People v Taylor*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325834) (hereinafter, "*Taylor*, unpub op"). Defendant sought leave to appeal in this Court, and the application was held in abeyance multiple times while this Court and the United States Supreme Court continued to refine the contours of juvenile LWOP sentencing jurisprudence.[8] After the resolution of those cases, this Court ordered oral argument on the application in defendant's case, directing the parties to address

> whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)" as potentially mitigating circumstances. MCL 769.25(6). See also *People v Skinner*, 502 Mich 89, 113-116 (2018). In particular, the parties shall address: (1) which party, if any, bears the burden of proof of showing

[8] This case was first held in abeyance, *People v Taylor*, 893 NW2d 610 (2017), for *People v Hyatt*, 502 Mich 89; 917 NW2d 292 (2018) (holding that a sentence imposed under MCL 769.25 is not subject to a heightened standard of review). *Hyatt* was considered alongside *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018) (holding that MCL 769.25 does not require a judge to find any particular fact before imposing LWOP). Defendant's case was held in abeyance again after this Court granted leave to appeal in codefendant Masalmani's case. *People v Taylor*, 924 NW2d 592 (2019). The Court later vacated the grant order in that case over a dissent from Chief Justice MCCORMACK. *People v Masalmani*, 505 Mich 1090 (2020). Last, we held defendant's case in abeyance while the Supreme Court considered *Jones v Mississippi*, 593 US ___; 141 S Ct 1307; 209 L Ed 2d 390 (2021). *People v Taylor*, 949 NW2d 454 (2020).

> that a *Miller* factor does or does not suggest a LWOP sentence; (2) whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than his individual characteristics; and (3) whether the court properly considered the defendant's family and home environment, which the court characterized as "far from optimal," as weighing against his potential for rehabilitation. [*People v Taylor*, 508 Mich 938 (2021) (alteration in original).]

II. LEGAL LANDSCAPE

The Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishments." US Const, Am VIII.[9] This amendment " 'guarantees individuals the right not to be subjected to excessive sanctions.' " *Miller*, 567 US at 469, quoting *Roper v Simmons*, 543 US 551, 560; 125 S Ct 1183; 161 L Ed 2d 1 (2005). A "basic precept of justice" requires that punishment must be proportionate to both the offense and the offender. *Miller*, 567 US at 469 (quotation marks and citation omitted).

"[C]hildren are constitutionally different from adults for purposes of sentencing." *Id*. at 471. In general, juveniles are less deserving of the most severe

[9] We note that the Michigan Constitution prohibits "cruel *or* unusual punishment." Const 1963, art 1, § 16 (emphasis added). Article 1, § 16 is thus interpreted more broadly than the Eighth Amendment. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992); *People v Parks*, 510 Mich 225, 241; 987 NW2d 161 (2022); *People v Stovall*, 510 Mich 301, 314; 987 NW2d 85 (2022). Defendant's original application for leave to appeal in this Court did not raise an argument under this provision, nor did we ask the parties to address state constitutional principles. We therefore decline to address whether defendant's sentence violates Const 1963, art 1, § 16.

punishments because of their diminished culpability and increased prospects for reform. *Id*. Juveniles lack maturity, possess an underdeveloped sense of responsibility, are more vulnerable to negative outside influence, have limited control over their own environment, and have transitory personality traits. *Id*. For these reasons and others, the Supreme Court held in *Roper*, 543 US at 578, that the Eighth Amendment bars capital punishment for offenders who were under the age of 18 when they committed their crimes and held in *Graham v Florida*, 560 US 48, 82; 130 S Ct 2011; 176 L Ed 2d 825 (2010), that the Eighth Amendment prohibits the sentence of LWOP for juveniles who commit nonhomicide offenses. The Supreme Court later summarized:

> *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in *Graham* [because] [d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. [*Miller*, 567 US at 472-473 (quotation marks, citations, and brackets omitted).]

Next came *Miller*, 567 US 460, in which the Supreme Court held that the Eighth Amendment prohibits mandatory LWOP sentences for crimes committed when the offender was under 18 years old. Mandatory LWOP penalty schemes "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id*. at 476. This "poses too great a risk of disproportionate punishment." *Id*. at 479. "[I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id*. at 477.

The Supreme Court set forth circumstances that a trial court should consider before concluding that it is appropriate to sentence a juvenile offender to die in prison. *Id*. at 477-478. Those "*Miller* factors" are: (1) the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the juvenile's family and home environment—"from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) "the incompetencies of youth," which affect whether the juvenile might have been charged with and convicted of a lesser crime, for example, because the juvenile was unable to deal with law enforcement or prosecutors or because the juvenile did not have the capacity to assist their attorney in their own defense; and (5) the juvenile's "possibility of rehabilitation." *Id*. These factors have been expressly incorporated into this state's discretionary juvenile LWOP sentencing scheme. MCL 769.25(6).

While the Supreme Court declined to categorically ban juvenile LWOP sentences for homicide convictions,

it reasoned that the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 567 US at 479. "That is especially so because of the great difficulty . . . of distinguishing at this early stage between the 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " *Id*. at 479-480, quoting *Roper*, 543 US at 773, and citing *Graham*, 560 US at 68.

A few years later, the Supreme Court held that *Miller* would be applied retroactively. *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016). In that case, the Supreme Court reiterated that, while *Miller* did not foreclose a sentencer's ability to sentence a juvenile to LWOP, "a lifetime in prison is a disproportionate sentence for all but the rarest of children" and is reserved for those "whose crimes reflect irreparable corruption." *Id*. at 195 (quotation marks and citations omitted). Most recently, in *Jones v Mississippi*, 593 US ___; 141 S Ct 1307; 209 L Ed 2d 390 (2021), the Supreme Court concluded that a factual finding of permanent incorrigibility was not constitutionally required before imposing an LWOP sentence on a juvenile offender. *Id*. at ___, ___; 141 S Ct at 1314, 1319. Even so, that decision "carefully follow[ed] both *Miller* and *Montgomery*" and reconfirmed that juvenile LWOP should be "relatively rare." *Id*. at ___, ___; 141 S Ct at 1318, 1321.

As for this Court's relevant precedent, in *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018), we considered whether MCL 769.25 was unconstitutional under the Sixth Amendment of the United States Constitution. We held that MCL 769.25 did not violate the Sixth Amendment because the statute did not

require a judge to find any particular fact before imposing LWOP. *Id*. at 97. The Court further recognized that, under *Miller*, the Eighth Amendment does not require a sentencer to make a finding of "irreparable corruption" before imposing an LWOP sentence. *Id*. at 120. The subsequent *Jones* decision confirmed that this was an accurate statement of law. *Jones*, 593 US at ___; 141 S Ct at 1318-1319 ("[T]he Court has unequivocally stated that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes [an LWOP] sentence on a murderer under 18.").

III. ANALYSIS

This Court reviews de novo questions of constitutional law. *People v Hughes*, 506 Mich 512, 522; 958 NW2d 98 (2020). A trial court's decision to sentence a juvenile to LWOP is reviewed for an abuse of discretion. *Skinner*, 502 Mich at 131-132. A sentencing court's underlying factual findings in support of a sentence are reviewed for clear error. *Id*. at 137 n 27.

Miller's substantive holding is that LWOP is an excessive sentence for children whose crimes reflect transient immaturity. *Montgomery*, 577 US at 210. In *Montgomery*, the Supreme Court acknowledged that the procedures necessary to implement that substantive guarantee are left to the states. *Id*. at 211 ("[T]his Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). Although *Jones* held that all that was required is a discretionary sentencing procedure, it also noted that its holding did "not preclude the States from imposing additional sentencing limits in cases involving defendants under 18

convicted of murder." *Jones*, 593 US at ___; 141 S Ct at 1323. The Michigan Legislature has imposed additional sentencing limits via MCL 769.25. It is this Court's duty to "determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object to be accomplished,"[10] *Gross v Gen Motors Corp*, 448 Mich 147, 158-159; 528 NW2d 707 (1995), and it is also our duty to ensure that sentencing judges have the tools to "determine the proper sentence in individual cases in light of the facts and circumstances of the offense," *Jones*, 593 US at ___; 141 S Ct at 1322.[11] With these principles in mind, today we clarify the procedural mechanisms necessary for applying MCL 769.25 that are consistent with the statutory language, the constitutional background giving rise to that statute, and standard motion practice in Michigan. Specifically, we hold that there is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and that it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing.

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[10] MCL 769.25 was enacted in direct response to the Supreme Court's *Miller* decision. We have no reason, therefore, to believe that our Legislature intended anything antithetical to the principles set forth in *Miller*.

[11] We are also empowered by Const 1963, art 6, § 5 to "establish, modify, amend, and simplify the practice and procedure in all courts of this state." This is generally accomplished by the issuance of administrative orders and the promulgation of court rules. This Court also, however, sometimes develops procedural rules through case law. See, e.g., *People v Killebrew*, 416 Mich 189, 194; 330 NW2d 834 (1982); *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). That said, we need not invoke that constitutional power here when our decision simply seeks to interpret the necessary procedural mechanisms inherent to the function of MCL 769.25.

It is helpful to start with an overview of MCL 769.25, the statute our Legislature enacted to remedy the constitutional defect present in sentencing schemes that allow for mandatory juvenile LWOP sentences. Under that statute, if a defendant who was less than 18 years old at the time of their crime is convicted of certain enumerated offenses, including first-degree murder, the prosecutor may file a motion seeking to have the juvenile sentenced to LWOP.[12] The motion "shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole." MCL 769.25(3). The defendant has 14 days to respond. MCL 769.25(5). After that, the court must conduct a hearing on the motion during which it must consider the *Miller* factors and may consider any other relevant criteria. MCL 769.25(6). Next, the court must "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). If the court decides not to sentence the defendant to LWOP, it must sentence the defendant to a statutory term of years. MCL 769.25(9).

The question of who bears the burden at a *Miller* hearing is relatively straightforward.[13] Although MCL

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[12] If no motion is filed within the prescribed period, the defendant must be sentenced to a term of years as governed by the statute. MCL 769.25(4).

[13] The *Skinner* Court stated that "there is language in *Montgomery* that suggests that the juvenile offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence." *Skinner*, 502 Mich at 131. We believe this dictum is a misreading of the *Montgomery* decision, which concerned the retroactive application of *Miller*. That juvenile defendants entitled to resentencing "must be given the opportunity to show their crime did not reflect irreparable corruption," *Montgomery*, 577 US at 213, simply

769.25 does not include a specified standard of proof, the burden of proof[14] is generally assigned to the party who "seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." 2 McCormick, Evidence (8th ed), § 337, p 696. This concept—that the moving party bears the burden—is uniformly present in Michigan practice and procedure in both criminal and civil contexts. See, e.g., *People v Denson*, 500 Mich 385, 398; 902 NW2d 306 (2017) (noting that the prosecution bears the burden of establishing a proper purpose when seeking to introduce other-acts evidence); *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008) (recognizing that the burden of proof rests on the party seeking a preliminary injunction); *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (stating that the burden of supporting its position is on the party moving to show summary disposition is appropriate); *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960) (explaining that the burden of showing the necessity of requested discovery "rests upon the moving party"); *People v Van Camp*, 356 Mich 593, 602-603; 97 NW2d 726 (1959) (noting that the burden is on the movant of a motion in

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indicates that those who had already served time in prison for the offense should be able to present to the resentencing court any relevant mitigating evidence accumulated since their original sentencing. We do not view this language from *Montgomery* as a pronouncement that a defendant bears the ultimate burden at a *Miller* hearing. In any event, the statement in *Skinner* was dictum and involved an interpretation solely of the constitutional requirements under *Montgomery*; it did not involve procedural mechanisms attached to a legislative sentencing scheme.

[14] The term "burden of proof" encompasses two separate burdens: the burden of producing evidence and the burden of persuading the trier of fact. 2 McCormick, Evidence (8th ed), § 336, p 692.

a criminal proceeding). Nothing in MCL 769.25 suggests a deviation from this standard practice. See *Malone v Lambrecht*, 305 Mich 58, 61-62; 8 NW2d 910 (1943) (noting that if the Legislature had intended to depart from a long-established construction, it "seems certain that it would have expressed such intention in clear and definite terms").[15]

Pursuant to the statutory scheme created by the Legislature, if the prosecutor does not seek LWOP for a juvenile defendant convicted of one of the enumerated offenses in MCL 769.25(2), then the default sentence is a term of years. MCL 769.25(4).[16] The Legislature could have simply made the *Miller* hearing the next step in the criminal proceeding. See, e.g., NC Gen Stat 15A-1340.19B. But, under our statutory scheme, a sentence of LWOP can be imposed only if the prosecutor files a motion. This motion requirement is meaningful. Under MCL 769.25, the status quo is that a juvenile defendant will be sentenced to a term of years; however, if the prosecution seeks to change the status quo by filing a motion to impose LWOP, it becomes the moving party that must bear the burden and risk of nonpersuasion at the *Miller* hearing.[17]

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[15] In a footnote, the *Skinner* Court suggested that the Legislature's failure to specify a burden of proof supported that the statute did not require any particular finding of fact. *Skinner*, 502 Mich at 118 n 13. We agree with the *Skinner* Court that no particular finding of fact is required under the Eighth Amendment, as affirmed in *Jones*, but its further statement about the burden of proof is dictum because it was unnecessary to the resolution of the case. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011).

[16] *People v Boykin*, 510 Mich 171, 184 n 4; 987 NW2d 58 (2022) ("The trial court possesses no authority to sentence a juvenile defendant to life without parole unless the prosecution first moves for that sentence and the proper hearing is conducted.").

[17] We agree with the dissent that the neither the prosecution nor the juvenile defendant bear any particular burden with respect to each

A few additional points are worth making. First, a *Miller* hearing is not comparable to an ordinary sentencing hearing in which neither the prosecutor nor the defendant generally bears any particular burden.[18] A *Miller* hearing has unique constitutional implications beyond those present at other sentencing hearings because it necessarily involves defendants who commit crimes when they are juveniles—individuals who are "constitutionally different" from their adult counterparts for purposes of sentencing. *Miller*, 567 US at 471. Second, unlike a typical sentencing, a *Miller* hearing is not a natural progression of a criminal proceeding because the prosecutor must file a motion to change the status quo posttrial. Third, to conclude that neither party bears the burden, as the prosecution argues, would allow LWOP to be the default sentence, which would run contrary to Supreme Court precedent[19] and the framework adopted by our Legislature under MCL 769.25. Finally, a no-burden standard is unworkable as it leaves a juvenile defendant to the whims of individual sentencing courts, instead of pro-

individual *Miller* factor. Under MCL 769.25, the *Miller* factors are simply to be "considered" and the trial court is to make pertinent findings of fact, but there is no burden of proof associated with those particular considerations.

[18] We have not traditionally viewed sentencing within any pronounced burden-shifting framework. In some instances, however, sentencing proceedings do have assigned burdens. For example, the prosecution bears the burden of establishing that challenged facts in the presentence report are accurate and bears the burden of establishing aggravating facts. See *People v Norfleet*, 317 Mich App 649, 669; 897 NW2d 195 (2016). The prosecution also bears the burden of establishing the proper amount of restitution when the amount is contested. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997), overruled on other grounds *People v McKinley*, 496 Mich 410 (2014).

[19] *Miller*, 567 US at 479 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possibly penalty will be uncommon.").

moting uniformity and fairness. See McCormick, § 336, p 694 (explaining that a possible risk posed by not allocating a burden is that a court might assign its own burden "describing that burden as it saw fit by substituting its own notions of policy"). This is particularly troublesome in a *Miller* hearing—when the trial court is faced with imposing the harshest possible punishment under Michigan law on some of the potentially least culpable offenders.

Because the prosecution bears the burden of proof as to the imposition of LWOP, the question becomes what does the prosecution need to prove or demonstrate in its role as the movant at a *Miller* hearing? *Skinner* and *Jones* make clear that, for Eighth Amendment purposes, MCL 769.25 does not require the trial court to make any particular finding of fact before the court can impose LWOP. *Skinner*, 502 Mich at 114; *Jones*, 593 US at ___; 141 S Ct at 1319. We do not deviate from that holding, and we do not suggest that there is one particular fact that a prosecutor must prove to establish that LWOP is appropriate. For example, the prosecutor need not prove that the defendant is "permanently incorrigible" or "irreparably corrupt." That said, the Legislature has created a scheme in which the prosecutor is the moving party, and as the bearer of the burden, the prosecutor must prove something.

In this regard, we hold that if the prosecutor seeks to have a juvenile offender sentenced to LWOP pursuant to MCL 769.25, it is the prosecutor's burden to overcome the presumption that LWOP is disproportionate. "[A] presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." McCormick, § 342, p 724. "[T]he most important consideration in the creation of presumptions is probabil-

ity." *Id*. at § 343, p 731. A steady line of precedent from the Supreme Court could not be clearer—persons under 18,[20] *as a group*, are less culpable than adults, more prone to outside influence, and more likely to be rehabilitated. For these reasons and others, juveniles are "less deserving of the most severe punishments." *Miller*, 567 US at 471 (quotation marks and citation omitted). This is why the Supreme Court has, for example, *categorically* banned certain punishments for defendants under 18 and why *all* juvenile offenders are entitled to a discretionary sentencing procedure when it comes to LWOP sentencing. As a procedural mechanism, therefore, it makes sense for sentencing courts to start from the premise that the juvenile defendant before them, like most juveniles, has engaged in criminality because of transient immaturity, not irreparable corruption. In other words, it is likely that the juvenile offender standing before the court possesses those attributes of youth that diminish the penological justifications for imposing the harshest sentences available under Michigan law.

Again, MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence. *Skinner*, 502 Mich at 97. That the court need not make any particular finding of fact, however, does not relieve the prosecutor of the burden of demonstrating facts that support their extraordinary request to sentence a juvenile defendant to LWOP. In doing so, the prosecutor must prove facts and circumstances that rebut the presumption against LWOP by the well-known standard of clear and con-

[20] This Court has decided to extend that reasoning to 18-year-olds under state constitutional principles. See *Parks*, 510 Mich 225.

vincing evidence.[21] The trial court, in turn, must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP.[22] This is an exercise in discretion, not a fact-finding mission. See *Skinner*, 502 Mich at 116 n 11 (" 'Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining . . . which of those interests predominates.' "), quoting *United States v Gabrion*, 719 F3d 511, 532 (CA 6, 2013).

These procedural mechanisms do not run afoul of *Skinner* or *Jones*. It is true that in *Skinner* this Court wrote that "neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court." *Skinner*, 502 Mich at 131.[23] But the central holding in

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[21] The standard of proof serves to allocate the risk of error between litigants and reflects the relative importance attached to a decision. *Addington v Texas*, 441 US 418, 423; 99 S Ct 1804; 60 L Ed 2d 323 (1979). When the Legislature is silent on the standard of proof, the courts must prescribe one. *Herman & MacLean v Huddleston*, 459 US 375, 389; 103 S Ct 683; 74 L Ed 2d 548 (1983). The Supreme Court has explained that proof by clear and convincing evidence is appropriate when "particularly important individual interests or rights are at stake." *Id*. Considering the important Eighth Amendment right at stake in comparison to the fact that juvenile LWOP is not categorically barred in Michigan, we conclude that this standard of proof strikes the correct balance.

[22] Even if the presumption has been rebutted, the trial court is not obligated to impose LWOP.

[23] The dissent contends that *Skinner* actually "rejected the very presumption" that we have created today. In support, it notes that in *Skinner*'s companion case, *People v Hyatt*, 316 Mich App 368, 425-426; 891 NW2d 549 (2016), reversed in part by *Skinner*, 502 Mich 89 (2018), the Court of Appeals stated, "[w]hile we do not suggest a presumption against the constitutionality of [juvenile LWOP], we would be remiss not to note that review of that sentence requires a searching inquiry into the

Skinner was that "*Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id*. at 122. Whether a presumption against LWOP for juvenile offenders exists was irrelevant to the outcome of the case, and so this statement was nonbinding dictum. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication.") (quotation marks and citation omitted). Moreover, *Skinner* was interpreting what the federal *Constitution* requires while our decision today is about what the *statute* requires and how this Court can help guide trial courts in implementing the statute. In addition, the fact that *Miller* and *Montgomery* did not patently provide a presumption against LWOP is not dispositive. As the Supreme Court remarked in *Montgomery*, when a new substantive rule of constitutional law is established, the Supreme Court is "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the State's sovereign administration of their criminal justice systems." *Mont-*

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record with the understanding that, more likely than not, a[n] [LWOP] sentence imposed on a juvenile is disproportionate." Despite the panel's caveat, the *Skinner* Court concluded that this statement sounded "tantamount to a presumption against" LWOP and implicitly rejected it. *Skinner*, 502 Mich at 128-129. This presumption-sounding statement in *Hyatt*, however, was made in the context of the Court of Appeals' conclusion that juvenile LWOP sentences were subject to a heightened standard of review. *Hyatt*, 316 Mich App 422-427. In other words, upon closer review, the presumption that the dissent believes the *Skinner* Court rejected from *Hyatt* was an appellate presumption, not the type of presumption we find inherent in MCL 769.25.

gomery, 577 US at 211.[24] Finally, while the *Jones* Court rejected that a separate factual finding of incorrigibility was a constitutionally required means to implement *Miller*, it in no way walked back the primary essence of that decision—that a juvenile LWOP sentence should remain "relatively rare." *Jones*, 593 US at ___, ___; 141 S Ct at 1318, 1321 ("The Court's decision today carefully follows both *Miller* and *Montgomery*.").

As in *Miller*, our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence. *Miller*, 467 US at 489.

IV. CONCLUSION

Our decision today seeks to provide guidance and ensure uniformity in the procedures used by sentencing courts when facing the monumental responsibility of balancing the lessened culpability of juveniles and their capacity for change and rehabilitation with their often abhorrent criminal actions. It also intends to ensure that a juvenile defendant's substantive Eighth Amendment right against receiving an excessive sentence remains safeguarded by our Legislature's statutory scheme. Accordingly, we hold that MCL 769.25 expressly requires that the prosecutor play the role of moving party and that, therefore, the prosecutor bears the burden of proof at a *Miller* hearing. That burden is to rebut a presumption that the particular juvenile defendant is not deserving of LWOP. If the prosecutor cannot shoulder this burden by clear and convincing

[24] For this reason, while an explicit presumption is not present in *Miller* or *Montgomery*, we reject the dissent's allegation that our interpretation of MCL 769.25 as necessarily including one constitutes "contorted logic."

evidence, the trial court must sentence the defendant to a term of years. With this guidance on practice and procedure,[25] it is our sincere hope that Michigan's discretionary sentencing scheme, MCL 769.25, can live up to the Supreme Court's philosophy that a discretionary sentencing procedure will ensure that juvenile LWOP remains relatively rare. *Jones*, 593 US at ___; 141 S Ct at 1318.

Before the trial court can implement these procedures, however, the Court of Appeals must address an issue raised by defendant in his appeal of right. In his Court of Appeals brief, defendant argued that his LWOP sentence violates the Eighth Amendment and Const 1963, art 1, § 16 because he was convicted of felony murder as an aider and abettor. The panel failed to address this issue, so we remand to that Court for consideration of defendant's argument. We do not retain jurisdiction.

MCCORMACK, C.J., and BERNSTEIN and WELCH, JJ., concurred with CAVANAGH, J.

MCCORMACK, C.J. (*concurring*). I concur fully with the majority opinion. I write separately to explain, as I

[25] Because defendant is entitled to resentencing, we do not discuss the specifics of the trial court's use of the *Miller* factors. We take this opportunity, however, to reiterate that it is "undisputed that all of [the *Miller* factors] are mitigating factors." *Skinner*, 502 Mich at 115. If a particular *Miller* factor does not militate against LWOP, for example, at most that factor will be considered neutral. See *Masalmani*, 505 Mich at 1090, 1090 (MCCORMACK, C.J., dissenting). Here, for example, it appears that at times the trial court suggested that some of the *Miller* factors —such as defendant's chronological age and proximity to age 18 or the dearth of evidence indicating that the incompetencies of youth hindered his ability to navigate the criminal justice system—*favored* LWOP. We caution the trial courts to ensure that the *Miller* factors are not used as aggravators.

did in *People v Masalmani*, 505 Mich 1090 (2020) (MCCORMACK, C.J., dissenting), why I believe the trial court abused its discretion in applying the factors from *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), when sentencing the defendant, Robert Taylor. As the majority explains, those factors are (1) the juvenile's chronological age and its hallmark features, including immaturity, impetuosity, and failure to appreciate risks and consequences, (2) the juvenile's family and home environment, (3) the circumstances of the homicide offense, including the extent of his participation and the way familial and peer pressures may have affected him, (4) "the incompetencies of youth," and (5) the juvenile's possibility of rehabilitation. *Id*. at 477-478.

I. CHRONOLOGICAL AGE AND ITS HALLMARK FEATURES

The first *Miller* factor requires considering the juvenile defendant's "chronological age and its hallmark features . . . ." *Id*. at 477. These hallmark features include "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id*. Most juveniles possess these characteristics. *Id*. at 471 (noting that it was "common sense" and that " 'any parent knows' " that children possess these characteristics) (citation omitted); *Eddings v Oklahoma*, 455 US 104, 116; 102 S Ct 869; 71 L Ed 2d 1 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult.").

The defendant was 16 years and 10 months old at the time of the offense. The trial court found noteworthy that although he was 10 months younger than his codefendant, Ihab Masalmani, the defendant was "still much older than the 14-year old [sic] defendants in *Miller*." As to the "hallmark features" of youth, the trial court acknowledged that the defendant presented an

expert, Dr. Daniel P. Keating, who testified that an adolescent's limbic system, "which serves as an arousal system, . . . an incentive system, and a reward system" is more active than an adult's. The expert also explained that the prefrontal cortex is supposed to work as a "brake on the [limbic] system but it develops much more slowly than the limbic system." There is thus a "developmental maturity mismatch" between the two systems in adolescents. As a result, Keating explained, teenagers tend to engage in reckless behavior.

But the trial court found that the defendant's age and its hallmark features did not "significantly mitigate defendant's culpability." The court believed that the defendant was readily distinguishable from the *Miller* defendants because those defendants were roughly two years younger. Although Keating stated that the prefrontal cortex remains undeveloped, the court reasoned that because it was "not free to take this developmental disconnect into consideration when a criminal is over 18," and this defendant was only 14 months shy of 18, his developmental disconnect was "not much more pronounced than that of an 18 year old." Ultimately, the court was "not convinced that this factor mitigates against a sentence of life without the possibility of parole" (LWOP).

The Court of Appeals agreed with the trial court's consideration of this first factor. *People v Taylor*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325834); slip op at 3-4. For the panel, the defendant's age was "in marked contrast to the 14-year-old defendants in *Miller*[.]" *Id*. And it concluded that the record refuted "any claim that the hallmark features of adolescence identified in *Miller* . . . played any role in defendant's crimes." *Id*. at 4. Unlike in *Miller*, this case did not

involve a botched robbery[1] but brazen criminal action over a long period. *Id*. To the panel, this demonstrated that the crime was "not reflective of a merely immature or impetuous adolescent who fails to appreciate risks and consequences." *Id*. Finally, the panel concluded that Keating's testimony had "minimal bearing" because he did not personally meet or interview the defendant and his testimony only addressed "generic brain science." *Id*.

I am not persuaded by either court's reasoning. A juvenile defendant need not be the same age as the petitioners from *Miller* to receive the benefit of the *Miller* decision. The Supreme Court drew the line at 18, not 14. Proximity to age 18 can affect the *extent* of the mitigation; the Supreme Court suggested as much. *Miller*, 567 US at 476-477 (explaining that one of the flaws of mandatory LWOP is that it mandates the same sentence for "the 17-year-old and the 14-year-old"); *id*. at 480 n 8 ("Our holding requires factfinders . . . to take into account the differences among defendants . . . ."). But that is the question: how does a juvenile's age affect the extent of mitigation? Proximity to age 18 is emphatically not an aggravating factor.

The trial court also concluded—despite the brain science presented—that because an 18 year old could not benefit from consideration of that information, neither should a 16-year-old defendant. This was also

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[1] This is not accurate. While one of the juvenile petitioners (Kuntrell Jackson) was convicted of murder stemming from a spur-of-the-moment botched robbery, the other juvenile petitioner (Evan Miller) engaged in a botched robbery *and* other criminal actions over a long period, including murder and arson. *Miller*, 567 US at 465-466, 467-468. More importantly, the criminal conduct need not match that in *Miller*'s holding because the *Miller* rule is not offense-specific. "[N]one of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id*. at 473.

error. As I have stated, "*Miller* did not suggest that 18-year-olds are, as a class, equipped with the decision-making faculties that 17-year-olds lack. Nor did *Miller* suggest that a sentencer should disregard the expanding body of scientific knowledge on adolescent brain development merely because an older offender who, although developmentally similar, may be subject to mandatory LWOP sentencing." *Masalmani*, 505 Mich at 1093 (MCCORMACK, C.J., dissenting).

In other words, *Miller* requires that juveniles under 18 are to be treated, categorically, as having diminished culpability. That the Eighth Amendment might not require the same for similarly situated 18-year-olds is not constitutionally relevant. It is not a juvenile defendant's burden to prove that they were especially immature, impetuous, or risk-seeking. *Miller* requires that we start from the premise that every youthful offender possesses these characteristics. Moreover, the Court of Appeals' view that Keating's testimony was only minimally relevant because he did not personally interview the defendant turns the starting presumption upside down. Rather, Keating's testimony reflects the starting presumption that LWOP is not appropriate.

II. FAMILY AND HOME ENVIRONMENT

The next *Miller* factor is the juvenile's home and family environment. *Miller*, 567 US at 477. Juveniles subjected to trauma, abuse, and neglect are more vulnerable to outside influences than ordinary teenagers and suffer from cognitive underdevelopment, lack of maturity, and decreased ability to restrain impulses. Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-year-old Children to Die in Prison* (January 2008), p 18, available at <https://eji.org/wp-

content/uploads/2019/10/cruel-and-unusual.pdf> (accessed June 8, 2022) [https://perma.cc/Z9MW-KCS2]. One of the *Miller* petitioners was physically abused and neglected by addict parents, in and out of foster care, and struggled with mental health issues, *Miller*, 567 US at 479, and the other petitioner came from a background of violence, *id*. at 478.

The trial court here recognized the defendant's difficult home and family environment. He was born to a teenaged mother and grew up in an unstable and unsafe environment; there was an active child protective case open on the family from the time the defendant was 6 years old. He was neglected and subjected to violence and substance abuse. His father, who was addicted to alcohol and cocaine, was not present. More than once, the defendant and his siblings did not have adequate food and shelter.

The trial court concluded from this evidence that the defendant's family environment was "far from optimal" but determined only that this factor "*could arguably* favor some leniency or lessening of culpability for defendant." (Emphasis added.) The Court of Appeals affirmed: "In light of these far from optimal circumstances, the trial court properly weighed this factor in favor of defendant and against a life without parole sentence." *Taylor*, unpub op at 4.

I agree with the trial court that the defendant's home environment was "far from optimal" but disagree it only *arguably* favors leniency. As the Supreme Court has said, "vulnerability and comparative lack of control over their immediate surroundings mean[s] juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper v Simmons*, 543 US 551, 570; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

III. CIRCUMSTANCES OF THE OFFENSE

The third *Miller* factor is the "circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him." *Miller*, 567 US at 477. Because one of the *Miller* petitioners did not fire the bullet that killed the victim, had not intended her death, and was convicted as an aider and abettor, *id*. at 478, these circumstances were part of the calculus of determining the defendant's culpability, *id*.

In this case, the trial court recounted the grim details of the victim's abduction and death and acknowledged that it was the codefendant who shot the victim. And although the defendant's expert, Kathleen Schaefer, testified that "peer pressure is an issue for children," the court determined that no specific evidence or testimony tied the defendant's criminal activity to "direct peer or family pressure." Thus, the trial court found that this factor "weighs in favor of finding that defendant's sentence of life without the possibility of parole is appropriate." The court was persuaded that because the defendant drove the victim around for hours and "facilitated his murder in cold blood . . . his actions were still quite culpable" given that there was no evidence that he did not expect the murder to occur, that he attempted to remove himself from the situation, or that he tried to dissuade his codefendant. According to the trial court, there was therefore nothing in the facts that would warrant anything less than LWOP.

The Court of Appeals agreed. *Taylor*, unpub op at 4-5. The panel reasoned that there is no categorical bar on LWOP for a juvenile convicted of felony murder on an aiding-and-abetting theory. *Id*. And given the sub-

stantial evidence that the defendant participated in the crime, "[t]he evidence supports the conclusion that defendant was actively and extensively involved in committing the crimes, and there is no indication that defendant was subjected to any family or peer pressure." *Id*.

As much as the trial court or the Court of Appeals believed that the defendant's failure to stop his codefendant's conduct, or at least to walk away from it, was evidence against mitigation, *Miller* says otherwise. Juveniles make rash decisions, cannot assess consequences, and are often unable to extricate themselves once criminal situations are set in motion. *Miller*, 567 US at 478 (noting that the petitioner's age "could well have affected his calculation of the risk . . . , as well as his willingness to walk away at that point").

Finally, the trial court did not address the fact that the defendant was convicted of felony murder, not premeditated murder, and as an aider and abettor, not as the principal offender; nor did it address that the defendant did not pull the trigger and may not have even been present when the victim was killed. See *Graham v Florida*, 560 US 48, 69; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (noting that a juvenile offender who does not kill or have an intent to kill has "a twice diminished moral culpability" as "compared to an adult murderer"). The trial court did not reconcile how both the defendant and his older codefendant—who killed the victim—can each be the truly "rare juvenile offender" given their different respective conduct. *Miller*, 567 US at 479-480 (quotation marks and citation omitted).

IV. INCOMPETENCIES OF YOUTH

The next *Miller* factor instructs trial courts to consider "the incompetencies associated with youth," *id*. at 477-478, because "[t]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings," *Graham*, 560 US at 78. For example, juveniles might be unable to deal with police officers or prosecutors or help their attorneys mount a defense, leading to charges and convictions of greater offenses than an adult more capable of navigating the criminal justice system. *Miller*, 567 US at 477-478.

The trial court found that there was no evidence that the incapacities of youth hurt the defendant's ability to participate in preparing his defense or led him to implicate himself to the authorities. Thus, it found that "this factor *favors* sentencing defendant to life without the possibility of parole." (Emphasis added.) The Court of Appeals seems to have recast the trial court's work: the panel held that "[t]his factor . . . did not weigh *in favor of mitigation*." *Taylor*, unpub op at 6 (emphasis added).

But the trial court found that this factor "favor[ed] sentencing defendant to life without the possibility of parole." That is, this factor was aggravating, not mitigating. The trial court's finding was clearly erroneous. "*Miller* did not suggest that a juvenile offender is more deserving of LWOP if the offender is better able to participate in their defense . . . ." *Masalmani*, 505 Mich at 1094 (MCCORMACK, C.J., dissenting). If a defendant's youth hindered their ability to successfully navigate the criminal justice system, that fact is mitigating. If a defendant's youth did not hinder their ability, this factor is neutral.

V. POSSIBILITY OF REHABILIATION

The final *Miller* factor is the possibility of rehabilitation. Permanent incorrigibility "is inconsistent with youth." *Miller*, 567 US at 473 (quotation marks and citations omitted). Few juveniles are truly incorrigible, and "many . . . have the capacity for change." *Graham*, 560 US at 77. While a trial court might "encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and [LWOP] is justified," this will be uncommon because of "children's diminished culpability and heightened capacity for change[.]" *Montgomery v Louisiana*, 577 US 190, 208; 136 S Ct 718; 193 L Ed 2d 599 (2016) (quotations marks and citation omitted).

The trial court found that the defendant's "far from optimal" home environment—the only factor the court found weighed against a sentence of LWOP—also showed that the defendant's prospects for rehabilitation were minimal, supporting LWOP. The court was persuaded that because no evidence showed rehabilitation, or that the defendant had accepted responsibility for his part in the offense, "that defendant's prospects for rehabilitation are negligible." As a result, the court reasoned that "this factor favors a sentence of life without the possibility of parole."

The Court of Appeals agreed with the trial court that the defendant's difficult upbringing "weighed in his favor" but also "[i]ndicated that he faces significant challenges in improving himself[.]" And, like the trial court, because there was no evidence that he had "accepted responsibility or shown genuine remorse for his crimes," there was no reason "to conclude that he has made any substantial progress in rehabilitating

himself . . . ." *Taylor*, unpub op at 6. There was also not "any discernable basis to conclude that he is likely to do so in the future." *Id*.

This gets the analysis exactly backward. Because there was no evidence that the defendant could *not* be rehabilitated, there is no reason to conclude that the defendant, like the great majority of youths, lacks the capacity to change and mature, as the Supreme Court has consistently made plain. *Miller*, 567 US at 479. Requiring the defendant to prove that he falls into the general category of adolescents turns *Miller* upside down.

An escalating propensity for crime is relevant, to be sure. But " 'only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.' " *Roper*, 543 US at 570, quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am Psychologist 1009, 1014 (2003). That is, juvenile criminal behavior does not inevitably predict adult criminal behavior. A lack of remorse is also relevant. The question is not whether the defendant was rehabilitated in 2014, but whether he could be rehabilitated within a statutory term of years—which can be up to 60.

Even more to the point, the trial court erred by finding that the defendant's family environment is mitigating under one *Miller* factor but that the same finding discounts the mitigation of another *Miller* factor. Childhood trauma, neglect, and abuse will always pose a challenge for a juvenile's rehabilitation. But the Supreme Court views a difficult upbringing as

a mitigating factor, not as evidence of impossible rehabilitation. The trial court's contrary assessment was error.

BERNSTEIN and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

VIVIANO, J. (*concurring in part and dissenting in part*). The majority uses this brutal kidnapping and murder case as an opportunity to drastically limit the discretion sentencing courts have traditionally held to impose a sentence on a defendant convicted of one of our state's most serious crimes. It announces a presumption against imposing a sentence of life without parole (LWOP) on juveniles who commit the crime of murder, ignoring our precedent that declined to recognize such a presumption only a few years ago. The majority then announces that the prosecution bears the burden of rebutting this presumption, despite the fact that no such burden exists in MCL 769.25, the statute that instructs courts when they may sentence a juvenile to LWOP. The majority's holding finds no support in the statute and conflicts with our caselaw, and its rewriting of the statute raises serious separation-of-powers concerns. Rather than attempting to micromanage how our trial court judges make sentencing decisions, I would apply the time-honored abuse-of-discretion standard consistent with our caselaw and hold that the learned trial judge did not abuse her discretion in resentencing defendant to LWOP.[1]

[1] I take no issue with the majority's remand to the Court of Appeals for it to address the issue that it did not address on direct appeal.

I. FACTS AND PROCEDURAL HISTORY

On August 9, 2009, defendant, Robert Taylor, who was then nearly 17 years old, helped his 17-year-old codefendant, Ihab Masalmani, brutally assault, kidnap, and murder a 21-year-old man in a random act of violence that began as a carjacking outside a sandwich shop on a Sunday afternoon. Defendant participated in the kidnapping as a lookout and by helping his codefendant get the victim into the car. Once inside the car, Masalmani and defendant showed the victim the gun and told him "what time it was," meaning that they intended to shoot him or beat him up. After Masalmani used the victim's ATM card to withdraw money, defendant and Masalmani took the victim to an abandoned house in Detroit, where Masalmani later shot the victim in the back of the head, killing him execution style. Defendant disposed of the murder weapon by selling it to someone on the street. Defendant was convicted by a jury of several offenses, the most serious of which was first-degree felony murder, MCL 750.316(1)(b). The trial court sentenced defendant to a mandatory term of LWOP for the felony-murder conviction.

After defendant was convicted but before he had filed his direct appeal, the United States Supreme Court decided *Miller v Alabama*, which held that mandatory LWOP for those under the age of 18 at the time of their crime is unconstitutional.[2] Our Legislature subsequently enacted MCL 769.25 and MCL 769.25a, which establish procedures for sentencing juvenile defendants and resentencing defendants in light of *Miller*, respectively. On direct appeal in this

[2] *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

case, the Court of Appeals remanding affirmed defendant's convictions but remanded for resentencing under *Miller* and MCL 769.25.[3]

A three-day resentencing hearing was held in 2014, at which there was testimony relating to both defendant and Masalmani. The trial court issued a written opinion, resentencing defendant to LWOP. The trial judge considered the five *Miller* factors and found that all of them except for defendant's home and family environment favored an LWOP sentence. First, the court looked at defendant's age and the "hallmark features" of it, noting that defendant was 16 years and 10 months old when he committed his crime, which was younger than Masalmani but older than the defendants in *Miller*, who were 14. The court noted that defendant was closer to 18 than the *Miller* defendants and reasoned that defendant's proximity to his 18th birthday suggested that the developmental disconnect between the parts of his brain would not be much more pronounced than that of an 18-year-old. Second, the court found "that defendant's family and home environment were very far from optimal." Third, the court looked at the circumstances of the offense, finding no evidence that peer pressure played a role. The court also found there to be no evidence that defendant did not expect the murder to occur. Fourth, the trial court found no evidence that the incapacities of youth prevented defendant from participating in his defense. Finally, the court opined that defendant's traumatic childhood reduced his likelihood of rehabilitation; it also found no evidence suggesting that defendant had shown signs of rehabilitation to date.

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[3] *People v Taylor*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2013 (Docket No. 303208), pp 1, 7-8.

Defendant appealed, and the Court of Appeals affirmed the sentence in an unpublished per curiam opinion, concluding that the sentencing judge did not abuse her discretion.[4] Defendant sought leave to appeal in this Court. We held the case in abeyance for a number of cases, most recently *Jones v Mississippi*, in which the Supreme Court granted certiorari to consider whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing an LWOP sentence.[5] After *Jones* was decided, we ordered oral argument on the application in this case, directing the parties to brief

> whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)" as potentially mitigating circumstances. MCL 769.25(6). See also *People v Skinner*, 502 Mich 89, 113-116 (2018). In particular, the parties shall address: (1) which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence; (2) whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than his individual characteristics; and (3) whether the court properly considered the defendant's family and home environment, which the court characterized as "far from optimal," as weighing against his potential for rehabilitation.[6]

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[4] *People v Taylor*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325834).

[5] *Jones v Mississippi*, 589 US ___; 140 S Ct 1293 (2020).

[6] *People v Taylor*, 508 Mich 938 (2021) (alteration in original).

II. LEGAL BACKGROUND

The Eighth Amendment of the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[7] Pursuant to this constitutional provision, the United States Supreme Court has limited the potential punishments available for juvenile offenders over the past 20 years. First, in *Roper v Simmons*, the United States Supreme Court held that imposing the death penalty on individuals for crimes committed under the age of 18 violates the Eighth and Fourteenth Amendments.[8] Next, in *Graham v Florida*, the Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[9]

Finally, in *Miller v Alabama*, the Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[10] In so holding, the Court relied on *Roper* and *Graham*, explaining:

> *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments. Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense

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[7] US Const, Am VIII.

[8] *Roper v Simmons*, 543 US 551, 560-579; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

[9] *Graham v Florida*, 560 US 48, 82; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

[10] *Miller*, 567 US at 479.

> of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.[11]

The Court further explained that mandatory LWOP

> prevent[s] the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.[12]

The Court highlighted five factors that a mandatory LWOP statute prevents the sentencer from considering:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies

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[11] *Id*. at 471 (cleaned up).

[12] *Id*. at 474.

> associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[13]

The defendants in *Miller* had argued that the Eighth Amendment requires a categorical bar on LWOP being imposed on juveniles.[14] The Court found it unnecessary to address this issue and declined to impose such a categorical bar but observed:

> [W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[15]

The Court did not foreclose the sentencer's ability to make that judgment in homicide cases but did require the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[16]

In response to *Miller*, our Legislature enacted MCL 769.25 and MCL 769.25a, which establish the procedures for when the prosecution seeks LWOP at sentencing or for the resentencing of a juvenile defendant.[17] Under these statutes, a trial court must

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[13] *Id*. at 477-478.

[14] *Id*. at 479.

[15] *Id*. at 479-480, quoting *Roper*, 543 US at 573.

[16] *Miller*, 567 US at 480.

[17] MCL 769.25a established a procedure for resentencing in the event *Miller* was given retroactive effect and is not relevant to this case.

sentence a defendant to a term of years if the prosecution does not file a motion to sentence the defendant to LWOP.[18] If the prosecution intends to seek an LWOP sentence, it must file a motion that "specif[ies] the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole."[19] The trial court is then required to conduct a hearing on the motion, at which it must consider the *Miller* factors and "may consider any other criteria relevant to its decision, including the individual's record while incarcerated."[20]

A few years later, the Supreme Court gave *Miller* retroactive effect.[21] In doing so, the Court explained that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," but the lack of such a fact-finding requirement "speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee."[22] "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."[23]

We subsequently considered a constitutional challenge to MCL 769.25 in *People v Skinner*.[24] There, we

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[18] MCL 769.25(4).

[19] MCL 769.25(3).

[20] MCL 769.25(6).

[21] See *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016).

[22] *Id*. at 211.

[23] *Id*.

[24] *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018).

held "that MCL 769.25 does not violate the Sixth Amendment because neither the statute nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead, life without parole is authorized by the jury's verdict alone."[25] Central to the holding was the fact that the *Miller* factors, which the trial court must consider during sentencing pursuant to MCL 769.25(6), are mitigating factors.[26] Because the Sixth Amendment only prohibits fact-finding that increases a sentence, considering the *Miller* factors in a way that reduces a sentence does not violate the Sixth Amendment.[27] We noted that although MCL 769.25(7) "requires the trial court to 'specify on the record the aggravating and mitigating circumstances considered by the trial court,' that does not necessarily mean that the trial court must specify an aggravating circumstance before it can impose a life-without-parole sentence upon a juvenile."[28] Instead, it means "that if the trial court *does* consider any aggravating (or mitigating) circumstances, it must specify those circumstances on the record."[29] We also rejected a presumption against LWOP sentences, noting that "neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court."[30] Finally, we concluded that "[t]he trial court remains in the best position to

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[25] *Id*. at 97.

[26] *Id*. at 115.

[27] *Id*. at 115-116.

[28] *Id*. at 117 n 12.

[29] *Id*.

[30] *Id*. at 128, 131.

determine whether each particular defendant is deserving of life without parole."[31]

Most recently, in *Jones*, the United States Supreme Court considered whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing an LWOP sentence.[32] The Court rejected the defendant's argument "that a sentencer who imposes a life-without-parole sentence must *also* make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible."[33] That argument was "inconsistent with the Court's precedents" because *Miller* requires "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" LWOP and *Montgomery* "flatly stated that '*Miller* did not impose a formal factfinding requirement' and added that 'a finding of fact regarding a child's incorrigibility . . . is not required.' "[34] The Court noted that, just as in *Miller* and *Montgomery*, its holding "does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."[35]

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[31] *Id*. at 137.

[32] *Jones v Mississippi*, 593 US ___; 141 S Ct 1307; 209 L Ed 390 (2021).

[33] *Id*. at ___; 141 S Ct at 1311.

[34] *Id*. at ___; 141 S Ct at 1311, quoting *Miller*, 567 US at 483, and *Montgomery*, 577 US at 190, 211.

[35] *Jones*, 593 US at ___: 141 S Ct at 1323.

III. THE MAJORITY'S PRESUMPTION THAT LWOP IS A DISPROPORTIONATE SENTENCE FOR JUVENILE DEFENDANTS IS NOT SUPPORTED BY THE STATUTE OR CASELAW

The majority declares that there is a presumption that LWOP is a disproportionate sentence for juveniles. It justifies the creation of such a presumption on *Miller*'s observation that, as a group, juveniles are "less deserving of the most severe punishments."[36] But in *Skinner*, we rejected the very presumption the majority creates today. In the companion case to *Skinner*, *People v Hyatt*, the Court of Appeals had stated, "While we do not suggest a presumption against the constitutionality of that sentence, we would be remiss not to note that review of that sentence requires a searching inquiry into the record with the understanding that, more likely than not, a life-without-parole sentence imposed on a juvenile is disproportionate."[37] In *Skinner*, we rejected this approach, explaining that "this sounds tantamount to a presumption against life-without-parole sentences."[38] We further observed that "neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court."[39]

The majority contends that *Skinner* is not binding precedent on this issue, characterizing as dicta our statement that "neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate

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[36] *Miller*, 567 US at 471 (quotation marks and citation omitted).

[37] *People v Hyatt*, 316 Mich App 368, 425-426; 891 NW2d 549 (2016), aff'd in part and rev'd in part sub nom *Skinner*, 502 Mich 89.

[38] *Skinner*, 502 Mich at 128.

[39] *Id*. at 131.

court."[40] But the majority's focus on this statement in *Skinner* is a red herring. As the majority itself acknowledges, this statement was accurate with respect to what *Miller* and *Montgomery* said.[41] More significantly, as noted above, *Skinner* specifically rejected *Hyatt*'s creation of a presumption against LWOP for juveniles.[42] Indeed, the dissent in *Skinner* believed that *Miller* and *Montgomery* require a presumption against LWOP for juveniles and concluded that our interpretation of MCL 769.25 violated *Miller* because it did "not allow for such a presumption."[43] And in the dissent in *People v Masalmani*, three members of the majority in the present case indicated their belief that the lack of a presumption against LWOP in *Miller* and *Montgomery* was an integral part to our rationale in *Skinner*.[44] Thus, the majority is simply incorrect when it asserts that the presumption it announces today does not run afoul of *Skinner*.[45]

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[40] *Id*.

[41] See *ante* at 137 (acknowledging "that *Miller* and *Montgomery* did not patently provide a presumption against LWOP").

[42] *Skinner*, 502 Mich at 128.

[43] *Id*. at 150 (MCCORMACK, J., dissenting).

[44] See *People v Masalmani*, 505 Mich 1090, 1092 (2020) (MCCORMACK, C.J., dissenting) ("This Court avoided the Sixth Amendment issue and held that MCL 769.25 does not require a trial court to make *any* additional findings (beyond the offender's guilt) before sentencing a juvenile offender to LWOP. *Skinner*, 502 Mich at 117-119 (opinion of the Court). That is, there is no judicial fact-finding problem, because there is no fact-finding requirement. The Court reasoned that such a result is consistent with *Miller* (and *Montgomery v Louisiana*, 577 US 190 (2016)), because those decisions do not impose a presumption against LWOP for juvenile offenders. *Skinner*, 502 Mich at 131.").

[45] The majority attempts to distinguish *Skinner* by noting that *Hyatt* had imposed a heightened standard of review on LWOP sentences that were appealed, while contending that in this case it is simply finding a presumption against LWOP inherent in MCL 769.25. But the height-

It is true, as the majority observes, that *Skinner* considered what was constitutionally required and not whether MCL 769.25 created a presumption against LWOP. But MCL 769.25 was in effect when *Skinner* was decided, and nothing in the language of the statute indicates that such a presumption exists. Indeed, MCL 769.25(6) contains an express reference to the *Miller* factors, but—as already noted—neither *Miller* nor *Montgomery* contain a presumption against LWOP for juvenile offenders. If the Legislature had intended to create a presumption against LWOP not found in *Miller* at the time it incorporated the *Miller* factors in MCL 769.25, one would think it would have expressly done so. By conjuring an extrastatutory presumption against LWOP for juveniles as part of the procedure the Legislature created when it enacted MCL 769.25, the majority violates the omitted-case canon of statutory interpretation.[46] Apparently, according to the majority's contorted logic, while it rejects any notion "that our Legislature intended anything antithetical to the

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ened standard of review that *Hyatt* imposed was inextricably linked with what the panel in that case believed was also required of trial courts. Prior to stating that an appellate court was required to conduct a "searching inquiry into the record with the understanding that, more likely than not, a life-without-parole sentence imposed on a juvenile is disproportionate," *Hyatt*, 316 Mich App 426, the Court stated that "trial courts must operate with the understanding that, more likely than not, a life-without-parole sentence is disproportionate for the juvenile offender being sentenced," *id*. at 421. Furthermore, an appellate presumption against LWOP without a corresponding presumption in the trial court would make no sense. If a presumption were to exist only at the appellate level, it would be the action of filing an appeal, rather than the sentence to LWOP itself, that created a presumption that the sentence is unconstitutional.

[46] See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 93 ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.") (emphasis omitted).

principles set forth in *Miller*" when it adopted MCL 769.25, somehow the majority has discovered an extratextual presumption in the statute not found in *Miller* or *Montgomery*. The majority's creation of an extrastatutory presumption also raises serious separation-of-powers concerns. To the extent the presumption essentially supplements the statute, it is akin to an amendment of the statute, which is clearly beyond judicial power.[47]

Finally, the mere fact that a trial court is prohibited from imposing an LWOP sentence unless the prosecution files a motion requesting that sentence does not mean that there is a presumption against an LWOP sentence once the prosecution has filed the motion. As discussed below, the requirement that the prosecution must file a motion requesting an LWOP sentence is only a condition precedent, not evidence of a presumption. Rather than adopt an extrastatutory presumption against LWOP for juveniles, I would simply require that the trial court apply the *Miller* factors as mandated by *Miller* and MCL 769.25(6).

IV. NEITHER PARTY SHOULD BEAR THE BURDEN OF PROOF WITH RESPECT TO THE INDIVIDUAL *MILLER* FACTORS

The majority does not stop at creating a presumption against LWOP for juveniles. It also declares that the prosecution has the burden to overcome this presumption by clear and convincing evidence. Again, no such requirement is found in MCL 769.25, which raises the same interpretive and separation-of-powers concerns already discussed.

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[47] See *People v Harris*, 499 Mich 332, 356; 885 NW2d 832 (2016) ("It is not our role to rewrite the law or substitute our own policy judgment in the face of the text of the statute . . . ."); see also *People v Parks*, 510 Mich 225, 292-299; 987 NW2d 161 (CLEMENT, J., dissenting).

Although trial courts generally have "broad discretion in imposing a sentence within a statutory range,"[48] our Legislature has chosen to limit this otherwise broad discretion by enacting MCL 769.25. Indeed, a trial court has no authority to sentence a juvenile homicide offender to LWOP if the prosecutor does not file a motion requesting it to do so.[49] It is only after the prosecutor files such a motion that the trial court has the discretion to sentence a juvenile to LWOP. This does not mean, however, that the prosecution bears the burden of proof with respect to the individual *Miller* factors. As we stated in *Skinner*, "a trial court's decision to impose life without parole after considering the mitigating and aggravating circumstances is not a factual finding, but a moral judgment."[50] The *Miller* factors are undisputedly mitigating circumstances and, therefore, may weigh against the imposition of an LWOP sentence. But that determination is within the discretion of the trial court, not a fact to be proven or disproven by the parties.

The United States Supreme Court has come to a similar conclusion in the context of the death penalty.[51] At issue there was a state sentencing procedure that required the jury to consider aggravating and mitigating circumstances and determine whether the aggravating circumstances outweighed the mitigating circumstances such that the death penalty should be

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[48] *United States v Booker*, 543 US 220, 233; 125 S Ct 738; 160 L Ed 2d 621 (2005).

[49] MCL 769.25(4).

[50] *Skinner*, 502 Mich at 116 n 11.

[51] See *Kansas v Carr*, 577 US 108; 136 S Ct 633; 193 L Ed 2d 535 (2016).

imposed.[52] The United States Supreme Court has expressed doubt that it is "even possible to apply a standard of proof to the mitigating-factor determination" in a death penalty sentencing proceeding.[53] "Whether mitigation exists . . . is largely a judgment call . . . ."[54] The Court continued, "It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof."[55] Indeed, this is what the federal government has done in 18 USC 3593(c): "The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information." But our Legislature did not do so in MCL 769.25. MCL 769.25(6) contains no language regarding a burden and instead imposes an unqualified requirement that the trial court must consider the *Miller* factors and exercise its discretion to impose either a term-of-years sentence or an LWOP sentence. Therefore, I would conclude that neither party has the burden of proving to the sentencing court how it should weigh an individual *Miller* factor.

From a practical standpoint, far from being "unworkable," a no-burden standard makes good, common

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[52] *State v Carr*, 300 Kan 1, 308; 331 P3d 544 (2014).

[53] *Carr*, 577 US at 119.

[54] *Id*.

[55] *Id*.

sense. The *Miller* factors are not aggravating factors.[56] Therefore, a prosecutor who is seeking an LWOP sentence has no incentive to present evidence regarding the *Miller* factors. It is the defendant who has the incentive to present mitigating evidence.[57] But, again,

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[56] See *Skinner*, 502 Mich at 114-116. Because the *Miller* factors are not aggravating, a no-burden standard would not be unconstitutional. LaFave, Israel, King & Kerr explain in their seminal treatise *Criminal Procedure*:

> If a fact functions as an element of an aggravated offense, [then] the defendant has the right to demand proof of its existence beyond a reasonable doubt before a jury. If not, and the fact is merely a sentencing factor, proof before a judge by a lower standard will suffice. [6 LaFave et al, Criminal Procedure (4th ed), § 26.4(h), p 1007.]

Because placing the burden of proving mitigating factors beyond a preponderance of the evidence in capital cases on the defendant has been found not to violate due process, "due process would permit legislatures to place upon the defendant the burden of proving mitigating factors in noncapital cases as well." *Id*. at § 26.4(h), p 1010, citing *Walton v Arizona*, 497 US 639; 110 S Ct 3047; 111 L Ed 2d 511 (1990). Only a plurality in *Walton* agreed that placing the burden of proving mitigating factors on the defendant was constitutionally permitted. *Walton*, 497 US at 650-651 (opinion by White, J.). *Walton* was overruled on other grounds with respect to its holding, *id*. at 647-649 (opinion of the Court), that a judge, rather than a jury, could make a finding of aggravating factors to justify the imposition of the death penalty. *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002). But the Court later relied on *Walton* to uphold Kansas's statute that placed the burden of proving mitigating factors on the defendant. *Kansas v Marsh*, 548 US 163, 169-173; 126 S Ct 2516; 165 L Ed 2d 429 (2006). In *Walton* the Arizona legislature had incorporated the preponderance-of-the-evidence standard directly into its death penalty statutes, requiring that the defendant prove by that standard the existence of mitigating circumstances. See *Walton*, 497 US at 649; Arizona Rev Stat Ann 13-703(C) and (E) (1989). But, again, MCL 769.25 contains no express burden of proof.

[57] In *Skinner*, we observed that "there is language in *Montgomery* that suggests that the juvenile offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence." *Skinner*, 502 Mich at 131. To the extent that this was simply

MCL 769.25(6) requires the trial court to consider the *Miller* factors regardless of whether the defendant specifically argues that a given *Miller* factor weighs in his favor or not.[58]

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a recognition of the reality that a defendant will have an incentive to introduce mitigating evidence, I agree with this observation. But to the extent that this portion of *Skinner* could be interpreted as imposing a legal burden on a defendant to introduce mitigating evidence, I would question such an interpretation of *Montgomery*. *Skinner* cited the portion of *Montgomery* that said that "prisoners . . . must be given the opportunity to show their crime did not reflect irreparable corruption . . . ." *Montgomery*, 577 US at 213. But requiring that an opportunity be given to make an argument or introduce evidence does not shift the burden. For example, a defendant has the right to present evidence during a trial. *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."). But that does not shift the burden of proof at a criminal trial. Likewise, it would be wrong to conclude that *Montgomery*'s statement that prisoners must be given the opportunity to show that their crime does not warrant LWOP places a legal burden on the defendant in a *Miller* hearing.

[58] Of course, this entire analysis changes if a presumption against LWOP is imposed. At that point, the prosecution has an incentive to present evidence rebutting the mitigating effects of the *Miller* factors. Thus, the majority's characterization of a no-burden standard as "unworkable," *ante* at 133, is only true because of its erroneous recognition of a presumption against LWOP. Instead, if anything is unworkable, it is the majority's new framework, which requires the prosecutor to "prove facts and circumstances that rebut the presumption against LWOP by . . . clear and convincing evidence," *ante* at 135-136, while still acknowledging, as it must, that neither *Miller* and *Montgomery*, on the one hand, nor MCL 769.25, on the other, require a trial court to find a particular fact before it can impose an LWOP sentence. This will be a riddle wrapped up in an enigma for trial courts to ponder for years to come.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

The abuse-of-discretion standard that we use to review a trial court's sentencing decision is a deferential one.[59] "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes."[60] The trial court in this case carefully considered and applied each of the *Miller* factors in a lengthy, written opinion, finding that all but defendant's home and family environment favored sentencing defendant to LWOP. Notably, the Court of Appeals concluded that the sentencing judge did not abuse her discretion even under the heightened scrutiny required by the now-overruled opinion in *Hyatt*, which held that imposition of an LWOP sentence on a juvenile offender required appellate courts to view such "sentence[s] as inherently suspect."[61] Applying the abuse-of-discretion standard we announced in *Skinner*, I believe it was well within the range of principled outcomes for the trial court to sentence defendant to LWOP.[62]

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[59] See *Skinner*, 502 Mich at 135-136.

[60] *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016).

[61] *Hyatt*, 316 Mich App 368.

[62] Although the majority does not directly address the trial court's application of the *Miller* factors, the concurrence levels a number of criticisms against the trial court's original application of the *Miller* factors that I believe should be addressed. With respect to the first factor, chronological age and its hallmark features, the concurrence correctly notes that a juvenile does not need to be the same age as the individuals in *Miller* in order to benefit from *Miller* and that proximity to the age of 18 can affect the extent of mitigation this factor supports. But the trial court in this case never implied that a defendant needs to be the same age as the individuals in *Miller* to benefit from that decision. Instead, the trial court did precisely what the concurrence indicates is permissible—it found "that defendant's chronological age

VI. CONCLUSION

The breadth of the majority's holding in this case is breathtaking. The majority first contrives a presumption against LWOP for juveniles. In doing so, the majority deviates from prior cases declining to recognize such a presumption and ignores the intent of the Legislature. The majority then goes even further, requiring the prosecution to rebut this presumption by

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and its hallmark features do not significantly mitigate defendant's culpability." In other words, it relied on defendant's proximity to the age of 18 to determine the *extent* of mitigation.

Regarding the third factor, the circumstances of the offense, the concurrence contends that the trial court did not reconcile how defendant and his codefendant could both be the "truly 'rare juvenile' " discussed in *Miller* when it was only Masalmani who actually killed the victim. But nothing in *Miller* indicates that the trial court needed to make such a reconciliation on the record, and the circumstances of the offense are just one factor for a trial court to consider in fashioning a sentence. In any event, it is not hard for me to see how a trial judge could conclude that two individuals who participated in the brutal abduction and murder of a random victim are both incorrigible and incapable of reform despite playing different roles in the events that led to the murder.

Finally, with respect to the fifth factor, the possibility of rehabilitation, the concurrence implies that trial courts should avoid finding that a *Miller* factor is mitigating while also relying on that factor to discount the mitigation of another *Miller* factor. See *ante* at 148-150. What *Miller* ultimately requires is for trial courts "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 US at 480. Nothing in *Miller* indicates that the factors announced there were intended to be compartmentalized such that consideration of one factor cannot reduce the mitigating effect of another factor. Rather, the factors are merely a way to ensure that trial courts "take into account the differences among defendants and crimes." *Id*. at 480 n 8. Sometimes the presence of one mitigating factor may lead a trial court to conclude that the defendant's possibility of rehabilitation is minimal. Acknowledging this does not run afoul of *Miller*. On the contrary, it adheres to *Miller*'s requirement for individualized sentencing. See *id*. at 475.

clear and convincing evidence, which raises similar interpretive and separation-of-powers concerns.

This opinion is a brazen attempt by the majority to operationalize its policy preference and "sincere hope that . . . juvenile LWOP remains relatively rare."[63] But lost in its quixotic vision of juvenile offenders is any recognition of the enormous cost the Court imposes on the victim's family and friends by once again requiring them to relive this tragic crime at yet another resentencing. Nor do we offer any hope for closure some 13 years after this heinous crime was committed because the trial judge will again attempt to fashion a sentence in search of the ever-elusive blessing of today's majority.

Rather than changing how trial courts sentence juveniles facing LWOP, I would remand this case to the Court of Appeals for it to address the issue it did not address on direct appeal—whether defendant's sentence violates the Eighth Amendment and Const 1963, art 1, § 16—but I would otherwise affirm the Court of Appeals. For these reasons, I respectfully dissent.

ZAHRA and CLEMENT, JJ., concurred with VIVIANO, J.

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[63] *Ante* at 139.

PEOPLE v BOYKIN
PEOPLE v TATE

Docket Nos. 157738 and 158695. Argued on application for leave to appeal January 12, 2022. Decided July 28, 2022.

In Docket No. 157738, Demariol D. Boykin was convicted by a jury of first-degree murder, MCL 750.316(1)(c), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was initially sentenced to a mandatory term of life without the possibility of parole for first-degree murder, to be served consecutively to a two-year term for felony-firearm. His convictions and sentences were affirmed in an unpublished per curiam opinion of the Court of Appeals, issued July 14, 2005 (Docket No. 253224) (*Boykin I*). Subsequently, the United States Supreme Court decided *Miller v Alabama*, 567 US 460 (2012), which held that sentencing an individual to mandatory life without the possibility of parole for a crime they committed before the age of 18 (a juvenile offender) violated the Eighth Amendment's ban on cruel and unusual punishments and that trial courts are required to consider the attributes of youth when sentencing a juvenile offender to life without parole. In *Montgomery v Louisiana*, 577 US 190 (2016), the Supreme Court held that *Miller* was a substantive constitutional rule that was retroactive on state collateral review. The Michigan Legislature accounted for these changes by enacting MCL 769.25 and MCL 769.25a, which eliminated sentences of mandatory life imprisonment without the possibility of parole for all individuals who were convicted of specific crimes, including first-degree murder, for acts committed while they were juveniles. As a juvenile offender who was sentenced to a mandatory term of life imprisonment without the possibility of parole, Boykin was entitled to resentencing under MCL 769.25a. At resentencing, the prosecution did not move to seek a sentence of life without parole but instead sought a sentence of 40 to 60 years' imprisonment, which the trial court imposed. Boykin appealed this sentence by right. The Court of Appeals, MARKEY, P.J., and GADOLA, JJ. (SHAPIRO, J., dissenting), affirmed in an unpublished per curiam opinion issued March 20, 2018 (Docket No. 335862), holding that because the prosecutor had not sought a sentence of life without parole, the trial court

was not required to consider defendant's youth when imposing sentence. Boykin sought leave to appeal in the Supreme Court, which directed and heard oral argument on the application for leave to appeal. 507 Mich 960 (2021).

In Docket No. 158695, Tyler M. Tate was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a); making a false report of a felony to police, MCL 750.411a(1)(b); and lying to a police officer in a criminal investigation, MCL 750.479c(2)(d)(*i*). He was sentenced on April 24, 2017, under MCL 769.25, which had become law in 2014. As with Boykin, the prosecution did not move to seek a sentence of life without the possibility of parole but instead sought the imposition of a 40- to 60-year sentence, which the trial court imposed. Tate appealed his sentence by right, and the Court of Appeals, M. J. KELLY, P.J., and MARKEY and FORT HOOD, JJ., affirmed in an unpublished per curiam opinion issued September 20, 2018 (Docket No. 338360). Tate sought leave to appeal in the Supreme Court, which directed oral argument on the application for leave to appeal. 507 Mich 961 (2021).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justices CLEMENT (except as to Part IV(B)), CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Sentencing courts must consider a juvenile offender's youth as a mitigating factor at sentencing hearings conducted under MCL 769.25 or MCL 769.25a when the juvenile offender is sentenced to a term of years. However, this consideration need not be articulated on the record. Therefore, the Court of Appeals was correct when it held that there is no constitutional mandate to make specific findings on the record as to the *Miller* factors when a juvenile offender is sentenced to a term of years but that sentencing courts should be guided by the factors set forth in *People v Snow*, 386 Mich 586 (1972). Consideration of the *Snow* factors necessarily includes the consideration of youth as a mitigating factor. Because it is unclear whether the trial courts properly considered youth to be mitigating in either of these consolidated cases, yet the Court of Appeals affirmed the trial courts' sentencing decisions, the portions of both Court of Appeals opinions discussing defendants' sentencing challenges were vacated and the cases were remanded to the Court of Appeals for further consideration.

1. When the Legislature has assigned a range of sentencing outcomes for any given conviction, the trial court has authority to sentence a defendant within that range. Within that range, the sentence should be tailored to the particular circumstances of the

case and offender. It is the trial court's duty to exercise discretion in a way that ensures the individualized sentence conforms with the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 651 (1990). Under *Snow*, an appropriate sentence should give consideration to the reformation of the offender, the protection of society, the discipline of the offender, and the deterrence of others from committing the same offense. Within each of the two statutes at issue in these cases, MCL 769.25 and MCL 769.25a, there is a range of sentencing outcomes. Unless the prosecution moves to sentence a defendant to life in prison without the possibility of parole, juvenile defendants who are convicted of certain enumerated acts may receive a minimum sentence of 25 to 40 years and a maximum sentence of 60 years.

2. The Eighth Amendment's ban on cruel and unusual punishments requires courts to think differently about how juvenile offenders are sentenced. Since *Roper v Simmons*, 543 US 551 (2005), which held that the death penalty is an unconstitutional punishment for a juvenile offender , the Supreme Court has been clear that juvenile status matters at sentencing and that special consideration must be paid to youthful offenders before the harshest sentences may be imposed. The *Roper* Court explained that juvenile offenders have diminished culpability because they lack maturity and a developed sense of responsibility, are more vulnerable to negative influences and outside pressures, and do not yet have a well-formed character. Applying this same logic, the Supreme Court held in *Graham v Florida*, 560 US 48 (2010), that sentences of life without the possibility of parole are unconstitutional for juvenile offenders who did not commit homicide, noting that juvenile offenders are at a significant disadvantage in criminal proceedings because of the characteristics discussed in *Roper*. In *Miller*, the Supreme Court applied the logic and rationale from *Roper* and *Graham* that children are different from adults for purposes of sentencing in the context of mandatory life-without-parole sentences for homicide offenses, explaining that the characteristics of youth and the way they weaken rationales for punishments may render a sentence of life without the possibility of parole disproportionate even for a homicide offense. Therefore, when sentencing juvenile offenders to sentences of life imprisonment without the possibility of parole, trial courts are required to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

3. Consideration of youth and its attendant circumstances is required by Michigan's sentencing jurisprudence. Michigan's

sentencing caselaw focuses on *Milbourn*'s principle of proportionality, which requires sentences imposed to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. Because the United States Supreme Court has held that youth—a circumstance of the offender—matters at sentencing, Michigan caselaw requires that this relevant offender characteristic must be considered at sentencing. In *Snow*, the Michigan Supreme Court expressed the importance of four basic sentencing considerations: reformation of the offender, the protection of society, disciplining of the wrongdoer, and deterring others from committing similar offenses. Without considering the mitigating factors of youth, a sentence cannot adequately address any of these factors. Therefore, in all sentencing hearings conducted under MCL 769.25 or MCL 769.25a, trial courts are to consider the defendant's youth and must treat it as a mitigating factor. However, there is no constitutional, statutory, or common-law requirement that this consideration be stated on the record. Therefore, trial courts need not articulate their bases for considering an offender's youth during sentencing hearings conducted under MCL 769.25 and MCL 769.25a in which the offender is sentenced to a term of years.

4. In *Boykin II*, the Court of Appeals held that consideration of Boykin's youth was unnecessary because *Miller* only pertained to defendants who are sentenced to serve life without the possibility of parole, and the majority never addressed whether the trial court properly considered youth to be a mitigating factor when Boykin was sentenced. Accordingly, that opinion was vacated and the case was remanded to the Court of Appeals to consider that question. In *Tate*, rather than rejecting Tate's arguments, the Court of Appeals applied *People v Wines*, 323 Mich App 343 (2018), rev'd in nonrelevant part 506 Mich 954 (2020), which held that trial courts must consider the distinctive attributes of youth when sentencing a minor to a term of years pursuant to MCL 769.25a. The panel identified ways in which it believed the trial court gave consideration to Tate's attributes of youth; however, the examples appeared to only represent a small portion of the record established by the sentencing court, and it was not clear that defendant's youth was considered a mitigating factor rather than an aggravating factor. Although trial courts are not required to make a record that they considered each mitigating factor listed in *Miller*, whether the totality of the record established by the trial court complied with the requirement that a trial court consider youth to be a mitigating factor was a close question deserving of additional appellate review. Accordingly,

Part V of the Court of Appeals opinion, which discussed Tate's sentence, was vacated and the case was remanded to the Court of Appeals for reconsideration.

Court of Appeals judgments vacated in part; cases remanded to the Court of Appeals for further consideration.

Chief Justice MCCORMACK, concurring, fully agreed with the majority opinion but wrote separately to comment on the majority's conclusion that the Michigan Constitution does not require a trial court to articulate on the record how it considered the mitigating characteristics of youth when it sentences a juvenile defendant to a sentence other than life without the possibility of parole. She noted that the Michigan Constitution was not mentioned in these cases until Tate argued in a supplemental brief that his 40-year minimum sentence was disproportionate under Const 1963, art 1, § 16 and that this provision requires an on-the-record explanation of how the mitigating characteristics of youth affected the trial court's sentencing decision. While neither the statutory scheme nor the federal Constitution categorically requires an on-the-record articulation of how the characteristics of youth affect a sentencing court's decision, the majority correctly held that sentencing courts must consider those characteristics and treat them as mitigating. A trial court's failure to do so explicitly on the record, notwithstanding the absence of a categorical rule requiring an on-the-record articulation, stands a high chance of rendering its sentence a violation of Const 1963, art 1, § 16, and therefore an abuse of its discretion. The principles animating *Miller*, *Graham*, and *Roper*, together with Michigan precedent requiring individualized sentencing, may render a sentence where the effect of youth is unexplained at such high risk of violating those principles as to be constitutionally impermissible.

Justice CLEMENT, concurring in part and dissenting in part, agreed with the majority that trial courts are required to consider the mitigating effects of youth when sentencing a juvenile to a term-of-years sentence because youth affects the traditional penological goals that guide a sentencer's discretion. However, she dissented as to the majority's application of that rule to Tate because the trial court's record of its decision-making sufficiently justified the sentence imposed in order to facilitate appellate review, which is the sole articulation requirement mandated by Michigan's sentencing jurisprudence. The majority's decision to remand this case to the Court of Appeals for reconsideration muddied, if not contradicted, the majority's holding that no statutory or constitutional authority compels the trial court to

make an on-the-record explanation of its consideration of youth. To the extent that the majority believed that Tate was deserving of a shorter minimum sentence because of the mitigating effects of youth, that was a proportionality issue that should have been addressed at this stage and not remanded to the Court of Appeals, which already considered and rejected Tate's proportionality argument.

Justice ZAHRA, joined by Justice VIVIANO, dissenting, stated that *Miller*'s holding does not cover a lengthy term of imprisonment that falls short of life without parole, and given the absence of a constitutional, statutory, or precedential basis to do so, he would not have extended *Miller*'s reasoning to term-of-years sentences under MCL 769.25 and MCL 769.25a. He noted that the holding in *Miller* was limited to correcting the constitutional infirmity of sentencing schemes mandating life without parole for juvenile homicide offenders by requiring that sentencers be given the opportunity to consider the mitigating qualities of youth and the discretion to impose a lesser sentence, but that neither *Miller* nor its progeny required sentencers to consider the distinctive attributes of a juvenile homicide offender's youth when imposing a sentence less than life without parole. Further, MCL 769.25 and MCL 769.25a do not require sentencing courts to consider mitigating qualities of youth when sentencing a juvenile homicide offender to a term of years, and the Legislature's omission of this requirement was presumed to be an intentional policy choice that the judiciary may not second-guess or override. By enacting MCL 769.25 and MCL 769.25a, the Legislature put in place a scheme that necessarily accounts for a juvenile homicide offender's youth, even when the sentence imposed is a term of years. Moreover, while courts fashioning a proportionate sentence must take into account an offender's background, there was no basis in *Milbourn* to require that a trial judge tailor every defendant's sentence in relationship to the defendant's age. Given that sentencing courts are not required to articulate an on-the-record explanation of how youth or the *Miller* factors affect a term-of-years sentence imposed under MCL 769.25 or MCL 769.25a, there was no legal basis for affirming the Court of Appeals decision in *Wines*. Justice ZAHRA would have held that traditional sentencing considerations should apply when the sentence to be imposed on a juvenile homicide offender is less than life without parole, and he would have affirmed defendants' 40- to 60-year sentences.

CRIMINAL LAW — JUVENILES — HOMICIDE — RESENTENCING — CONSIDERATION OF YOUTH AS A MITIGATING FACTOR.

In all sentencing hearings conducted under MCL 769.25 or MCL 769.25a, trial courts must consider the defendant's youth and must treat it as a mitigating factor, regardless of whether the prosecuting attorney has requested the court to impose a sentence of imprisonment for life without the possibility of parole; trial courts, however, need not articulate on the record how an offender's youth affected the sentencing decision when sentencing an offender to a term of years under these provisions.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people in Docket No. 157738.

F. Randall Karfonta for defendant in Docket No. 157738.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amanda Morris Smith*, Assistant Prosecuting Attorney, for the people in Docket No. 158695.

Jones Day (by *Andrew J. Clopton*, *Amanda K. Rice*, *Eric A. Nicholson*, and *Shelbie M. Rose*) and Tyler M. Tate, *in propria persona*, for defendant in Docket No. 158695.

Amici Curiae:

State Appellate Defender Office and Criminal Defense Attorneys of Michigan (by *Tina N. Olson* and *Claire Alexis Ward*) in Docket Nos. 157738 and 158695.

BERNSTEIN, J. These consolidated cases concern the sentencing of two individuals who were convicted of

first-degree murder for crimes they committed before they turned 18, and who both received term-of-years sentences under MCL 769.25 or MCL 769.25a. In particular, we must decide whether trial courts have an obligation to expressly set forth how a defendant's age at the time a crime was committed might affect the judge's sentencing decision and whether trial courts must consider the distinctive attributes of youth, such as those discussed in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), when sentencing a juvenile defendant to a term-of-years sentence. We hold that trial courts must consider a juvenile defendant's youth to be a mitigating factor when sentencing them to term-of-years sentences under MCL 769.25 or MCL 769.25a; however, we find no basis for requiring trial courts to articulate on the record how a defendant's youth affected the decision. Accordingly, we vacate the judgments of the Court of Appeals to the extent they addressed sentencing issues and remand both cases to the Court of Appeals to determine whether the sentencing courts properly considered defendants' youth as a mitigating factor.

I. FACTS AND PROCEDURAL HISTORY

A. *PEOPLE v BOYKIN*

In 2003, when he was 17, defendant Demariol Dontaye Boykin was involved in a fatal shooting. The victim was engaged in a fistfight with one of Boykin's brothers, while Boykin, Boykin's father, and another one of his brothers watched. At one point, believing that the victim had removed an object from a pocket and struck his brother with it, Boykin pulled out a gun. The victim turned and ran but Boykin chased him, firing his gun a few times. The victim was hit by two bullets and fell down. Boykin ran up to the victim and

continued to kick and punch him while he was on the ground; his two brothers also joined in the beating. Boykin then tried to shoot the victim again at close range, but the gun misfired, so Boykin hit the victim in the face with the gun before fleeing the scene with his brothers in his father's car. The victim later died in the emergency room.

Boykin was charged with and convicted by a jury of first-degree murder, MCL 750.316(1)(c), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] He was initially sentenced to a mandatory term of life without the possibility of parole for first-degree murder, to be served consecutively to a two-year term for felony-firearm. Boykin's convictions and sentences were affirmed on appeal. *People v Boykin*, unpublished per curiam opinion of the Court of Appeals, issued July 14, 2005 (Docket No. 253224) (*Boykin I*). Before this action, Boykin also filed a number of unsuccessful postconviction measures to overturn his conviction and sentences.

After Boykin was sentenced in 2003, there were several notable changes in the law that substantively affected sentencing for juvenile defendants. In 2012, the United States Supreme Court decided *Miller*, which held that sentencing individuals to mandatory life without the possibility of parole for crimes they committed before the age of 18 violated the Eighth Amendment's ban on cruel and unusual punishments. *Miller*, 567 US at 489. Four years later, the Supreme Court announced that *Miller* was a substantive constitutional rule that was retroactive on state collateral review. *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016). The Michigan Legislature

[1] Boykin and both brothers were charged and convicted with respect to their roles in this altercation. Neither of Boykin's brothers is a party to this appeal.

accounted for these changes by enacting a sentencing scheme that eliminated mandatory life without the possibility of parole for all individuals who were convicted of specific crimes, including first-degree murder, for acts committed while they were juveniles. MCL 769.25; MCL 769.25a.[2]

As a juvenile offender who was sentenced to a mandatory term of life imprisonment without the possibility of parole, Boykin was entitled to resentencing under MCL 769.25a. His resentencing took place on October 28, 2016. The prosecution did not move the court to seek a sentence of life without the possibility of parole. Instead, the prosecution sought the imposition of a 40- to 60-year sentence, whereas Boykin argued for a 25- to 60-year sentence. After hearing from Boykin and the victim's brother, the trial court agreed with the prosecution and sentenced Boykin to serve 40 to 60 years in prison. Boykin appealed his sentence by right. The Court of Appeals affirmed in a split, unpublished decision. *People v Boykin*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2018 (Docket No. 335862) (*Boykin II*).

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[2] This sentencing scheme did not eradicate sentences of life without the possibility of parole for this class of defendant. Rather, it enabled the prosecution to move the trial court to seek a life-without-parole sentence for a particular defendant sentenced under MCL 769.25 or MCL 769.25a. MCL 769.25(3); MCL 769.25a(4). If, as here, the prosecution did not seek a life-without-parole sentence, a defendant must be sentenced to a term of years with a minimum sentencing range of 25 to 40 years and a maximum sentence of 60 years. MCL 769.25(9); MCL 769.25a(4)(c). The chief difference between MCL 769.25 and MCL 769.25a is that MCL 769.25 eliminated mandatory sentences of life without the possibility of parole for juveniles who were sentenced after *Miller* and MCL 769.25a enacted a resentencing scheme for these juvenile offenders already sentenced in the event *Miller* was given retroactive application. Therefore, since *Montgomery* held that *Miller* was to be given retroactive application, MCL 769.25a is the applicable statute for defendant Boykin's resentencing.

Boykin sought leave to appeal in this Court. We directed the Clerk to schedule oral argument at the same session as *People v Tate* and directed the parties to address:

> (1) whether the Court of Appeals correctly held in *People v Wines*, 323 Mich App 343 (2018), rev'd in nonrelevant part 506 Mich 954 (2020), that trial courts must consider the distinctive attributes of youth, such as those discussed in *Miller* . . . , when sentencing a minor to a term of years pursuant to MCL 769.25a; (2) if *Wines* was correctly decided, whether sentencing judges have an obligation to explicitly set forth their analysis of how the defendant's age impacted their sentencing discretion when proceeding under MCL 769.25a or MCL 769.25; and (3) if *Wines* applies to this case, whether the trial court complied with its requirements, and if it did not, what more the court was required to do. [*People v Boykin*, 507 Mich 960, 960-961 (2021)].

B. *PEOPLE v TATE*

Defendant Tyler Maurice Tate was involved in a gang-related shooting when he was 16 years old. Tate, Tyshon Taylor, Brendon Stanton-Lipscomb, and Demetrius Armour were all affiliated with a gang known as the Eastside Ghetto Boys or Rob Gang.[3] Tate and Taylor were at the Eastland Mall in Harper Woods on December 26, 2015, when they overheard the victim make a disparaging remark about the Rob Gang. After Stanton-Lipscomb was called and informed of what had happened, Stanton-Lipscomb asked for the victim to be escorted outside, where Stanton-Lipscomb planned to shoot him. Tate then led the victim and another person to the outside of the mall, where

[3] Each of these three individuals was also charged and prosecuted separately for his involvement in the incidents leading to Tate's convictions. They are not parties to this appeal.

Stanton-Lipscomb was hiding. Stanton-Lipscomb shot the victim several times, causing fatal wounds. The other individual escaped without injury.

Tate was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), making a false report of a felony to police, MCL 750.411a(1)(b), and lying to a police officer in a criminal investigation, MCL 750.479c(2)(d)(*i*). He was sentenced on April 24, 2017, under MCL 769.25, which had become law in 2014. As with Boykin, the prosecution did not move to seek a sentence of life without the possibility of parole, and instead sought the imposition of a 40- to 60-year sentence, whereas Tate argued for a 25- to 60-year sentence. After hearing from Tate and the victim's mother, the trial court agreed with the prosecution and sentenced Tate to serve 40 to 60 years in prison for his murder conviction, concurrent to one to four years each for his remaining convictions.

Tate appealed his sentence by right. The Court of Appeals affirmed. *People v Tate*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 338360).

Tate sought leave to appeal in this Court. We directed the Clerk of this Court to schedule oral argument, directing the parties to address the same issues as in *Boykin*. *People v Tate*, 507 Mich 961 (2021).

II. STANDARD OF REVIEW

Sentencing decisions are reviewed for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). An abuse-of-discretion standard recognizes that there may be more than one principled outcome and the trial court may not deviate from that principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

This case also concerns matters of constitutional and statutory interpretation, which are reviewed de novo. *People v McKinley*, 496 Mich 410, 414-415; 852 NW2d 770 (2014).

III. ANALYSIS

A. SENTENCING AUTHORITY

The Michigan Constitution vests sentencing authority in the Legislature. Const 1963, art 4, § 45; see also *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001) (citations omitted). "The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary." *Hegwood*, 465 Mich at 436-437.

Where the Legislature has assigned a range of sentencing outcomes for any given conviction, the trial court has authority to sentence a defendant within that range. Within that range, the sentence should be tailored to the particular circumstances of the case and offender. *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973). It is the trial court's duty to exercise discretion in a way that ensures the individualized sentence conforms with the principle of proportionality. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). An appropriate sentence should give consideration to the reformation of the offender, the protection of society, the discipline of the offender, and the deterrence of others from committing the same offense. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), citing *Williams v New York*, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949). However, these are not the only relevant sentencing criteria and trial courts are not required to consider each of these factors when

imposing a sentence. *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987).

Within each of the two statutes at issue here, MCL 769.25 and MCL 769.25a, there is a range of sentencing outcomes. Unless the prosecution moves to sentence a defendant to life in prison without the possibility of parole, juvenile defendants who are convicted of certain enumerated acts may receive a minimum sentence of 25 to 40 years and a maximum sentence of 60 years.[4] MCL 769.25(4), (9); MCL 769.25a(4)(c).

B. YOUTH IS A MITIGATING FACTOR THAT TRIAL COURTS MUST CONSIDER WHEN SENTENCING JUVENILE OFFENDERS UNDER MCL 769.25 AND MCL 769.25a

Sentencing juvenile defendants who were convicted of first-degree murder is an exceptionally daunting task for trial courts. On one hand, first-degree murder is an extremely serious offense, as it recognizes that at least one person is deceased. On the other hand, defendants who are sentenced under MCL 769.25 and MCL 769.25a were juveniles when they committed their crimes. Even as we keep in mind the solemnity of the acts that bring us to our consideration of the legal issues at hand, the Supreme Court has clearly signaled that the Eighth Amendment's ban on cruel and unusual punishments requires us to think differently about how we sentence juvenile offenders.

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[4] In *Boykin II*, the majority asserted that the trial court "sentenced defendant to a term of years, choosing not to impose a sentence of life without parole." *Boykin II*, unpub op at 3. This assertion is clearly erroneous. The trial court possesses no authority to sentence a juvenile defendant to life without parole unless the prosecution first moves for that sentence and the proper hearing is conducted. See MCL 769.25(4) and (9); MCL 769.25a(4)(c). Because the prosecution never moved to sentence Boykin to a sentence of life without the possibility of parole, the trial court could only impose a sentence within the applicable range of terms of years.

Since 2005, the Supreme Court's message has been clear: one's juvenile status matters, and special consideration must be paid to youthful offenders before the harshest sentences may be imposed. In the first of many cases dealing with juvenile offenders and sentencing, the Supreme Court held that the death penalty is an unconstitutional punishment for offenders who were under the age of 18 when their offenses were committed. *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005). In *Roper*, the Supreme Court relied on three general differences between juvenile and adult offenders that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id*. at 569. Those differences are: (1) juveniles have a " 'lack of maturity and an underdeveloped sense of responsibility,' " which "often result[s] in impetuous and ill-considered actions and decisions"; (2) juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and (3) "the character of a juvenile is not as well formed as that of an adult." *Id*. at 569-570 (citation omitted). These reasons mean that juvenile offenders have "a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment" and make it "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id*. at 570. "Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id*. at 571.

Five years later, applying this same logic, the Supreme Court held that sentences of life without the possibility of parole are unconstitutional for juvenile offenders who did not commit homicide. *Graham v*

Florida, 560 US 48, 76; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (holding that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed"). In the process, *Graham* added another reason why youth matters—that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Id*. at 78.

In *Miller*, the Supreme Court applied the logic and rationale from *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing" in the context of mandatory life-without-parole sentences for homicide offenses. *Miller*, 567 US at 471. Although *Graham*'s holding only concerned non-homicide offenses, the Supreme Court held that its underlying rationale was broader—the characteristics of youth and the way they weaken rationales for punishments may render a sentence of life without the possibility of parole disproportionate even for a homicide offense. *Id*. at 473. The Supreme Court noted that the problem with mandatory life-without-parole sentences is that they make youth and the factors of youth, as articulated by *Roper* and *Graham*, irrelevant and "pose[] too great a risk of disproportionate punishment." *Id*. at 479. Therefore, when sentencing juvenile offenders to sentences of life imprisonment without the possibility of parole, trial courts are required to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480.[5] Not having the ability to take these differences into account "dis-

[5] Because *Miller* incorporated the factors articulated in *Roper* and *Graham*, these factors together are colloquially known as the *Miller* factors.

regards the possibility of rehabilitation even when the circumstances most suggest it." *Id*. at 478.

Following *Roper*, *Graham*, and *Miller*, the Supreme Court has continued to articulate that "children are constitutionally different from adults in their level of culpability," when holding that *Miller* created a substantive rule of constitutional law that was to be given retroactive effect. *Montgomery*, 577 US at 213. Most recently, the Supreme Court again made clear that youth is a mitigating factor in sentencing juveniles. *Jones v Mississippi*, 593 US ___; 141 S Ct 1307, 1319; 209 L Ed 2d 390 (2021) (explaining that, "[f]aced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that *mitigating factor*") (emphasis added).

In these cases, the Supreme Court has identified and analyzed the unique attributes of youth and emphasized the importance of considering these attributes during sentencing.[6] Thus far, however, the Supreme Court has recognized a constitutional

[6] There is little practical difference between this majority opinion and the outcome preferred by the dissent. In order to come to a disagreement, the dissent narrowly reads *Roper*, *Miller*, *Montgomery*, and *Jones* at the same time that it broadly reads this opinion. The Supreme Court has been clear that youth matters in sentencing decisions. Most recently, the Supreme Court stated verbatim that, "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth." *Jones*, 593 US at ___; 141 S Ct at 1319. This opinion simply echoes that sentiment. Whereas the dissent is correct that *Miller* and *Montgomery* were decided in the context of mandatory sentences of life without the possibility of parole, *Jones* was decided squarely within the discretionary sentencing regime that was mandated by *Miller* and *Montgomery*. Thus, we respectfully disagree that the Supreme Court's holdings should be limited to the context of mandatory sentences of life without the possibility of parole.

requirement to consider these attributes only in the context of sentencing juveniles to life without the possibility of parole. Now we must decide whether consideration of these attributes is required when imposing a term-of-years sentence on a juvenile defendant. Keeping in mind the Supreme Court's consistent statement across Eighth Amendment cases that "youth matters in sentencing," *Jones*, 593 US at ___; 141 S Ct at 1314, we hold that consideration of youth and its attendant circumstances is also required by this state's sentencing jurisprudence.

Our sentencing caselaw focuses on the principle of proportionality, which requires sentences imposed "to be proportionate to the seriousness of the circumstances surrounding the offense *and the offender*." *Milbourn*, 435 Mich at 636 (emphasis added). Accordingly, because the Supreme Court has held that youth—a circumstance of the offender—matters at sentencing, our own caselaw requires that such a relevant offender characteristic must be considered at sentencing. In *Snow*, this Court decided the legality of a sentence that was made harsher because the defendant decided to face trial rather than plead guilty. In holding that the defendant was entitled to resentencing because the record was silent about why the defendant's sentence departed from the ordinary minimum sentence, this Court expressed the importance of four basic sentencing considerations. *Snow*, 386 Mich at 592, 594. Those four considerations are: (1) "reformation of the offender"; (2) "protection of society"; (3) "disciplining of the wrongdoer"; and (4) "deterrence of others from committing like offenses." *Id*. at 592.

Youth affects these considerations. For example, since "a greater possibility exists that a minor's character deficiencies will be reformed," the mitigating

qualities of youth necessarily transform the analysis of the first *Snow* criterion. *Roper*, 543 US at 570. Without considering the mitigating factors of youth, then, a sentence cannot adequately address the reformation of the offender. Next, because youth have a "heightened capacity for change" relative to adults, the needs for protecting society should be given individualized consideration, which necessarily considers the way youth affects the defendant's ability to change. *Miller*, 567 US at 479; see also *Jones*, 593 US at ___ n 7; 141 S Ct at 1337 n 7 (Sotomayor, J., dissenting) (explaining that "[t]he Eighth Amendment requires that sentencers (and reviewing courts) not presume that most juveniles will forever remain the 'murderers' they once were") (citation and comma omitted). In addition, because it is "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character," *Snow*'s focus on discipline of the wrongdoer must be viewed differently under the lens of youth. See *Roper*, 543 US at 570. "Nor can deterrence do the work in this context, because ' "the same characteristics that render juveniles less culpable than adults" ' . . . make them less likely to consider potential punishment." *Miller*, 567 US at 472, quoting *Graham*, 560 US at 72, quoting *Roper*, 543 US at 71. Given that youth is a mitigating factor, it will inevitably factor into *Snow*'s four considerations.

We thus hold, consistent with the Supreme Court's repeated recognition of youth's effect on sentencing and our own sentencing jurisprudence, that in all sentencing hearings conducted under MCL 769.25 or MCL 769.25a, trial courts are to consider the defendant's youth and must treat it as a mitigating factor.

C. TRIAL COURTS NEED NOT ARTICULATE THEIR BASES FOR CONSIDERING THE OFFENDERS' YOUTH WHEN SENTENCING YOUTHFUL OFFENDERS TO TERMS OF YEARS

The requirement to consider youth at sentencing is not necessarily the same as a requirement to articulate the *Miller* factors on the record during a sentencing hearing. There are a few possible sources of law that would require courts to articulate these factors on the record, such as a statute, the United States Constitution, the Michigan Constitution, or our caselaw. None of those sources of law expresses such a requirement.[7] Therefore, we hold that trial courts need not articulate their bases for considering an offender's youth during sentencing hearings conducted under MCL 769.25 and MCL 769.25a in which the offender is sentenced to a term of years.

MCL 769.25 is the relevant statute outlining sentencing procedure for juvenile defendants convicted of these enumerated offenses, including first-degree murder.[8] In enacting this statute, the Legislature differentiated between two plausible outcomes for offenders who were convicted of certain enumerated acts committed before they turned 18. A defendant could either receive a term of years with a minimum sentence of 25 to 40 years and a maximum of 60 years or, if the

[7] Because we are not persuaded by the briefs that the Michigan Constitution considers this specific issue in a meaningfully different way than these other sources of law, we decline to hold that there is an independent basis for an on-the-record articulation requirement under the Michigan Constitution.

[8] MCL 769.25a is also relevant for many members of this class of offender, including Boykin, who were sentenced before *Montgomery* held that *Miller* was retroactive. However, MCL 769.25a mirrors the pertinent requirements of MCL 769.25 and expressly incorporates the hearing procedures of MCL 769.25 without meaningful difference. See, e.g., MCL 769.25a(4)(b). Our holding thus pertains to both statutes.

prosecution timely moved to have the court consider it, life without the possibility of parole. Compare MCL 769.25(3) to MCL 769.25(4). If the prosecution seeks life without the possibility of parole, the trial court must conduct a hearing in which it considers the *Miller* factors. MCL 769.25(6). At that hearing, the trial court "shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). But if the prosecution does not move for life without the possibility of parole or if the trial court decides such a sentence is disproportionate, there is no analogous statutory provision requiring that the trial court specify on the record any specific factors or other sentencing criteria. MCL 769.25(9). This is a meaningful distinction. Thus, we find that there is no statutory support for requiring trial courts to articulate the mitigating factors of defendant's youth on the record in MCL 769.25 or MCL 769.25a hearings unless life without the possibility of parole is sought.

Nor does the United States Constitution impose such a requirement. *Jones* held that an on-the-record sentencing explanation of the *Miller* factors is not necessary in cases where a life-without-parole sentence is imposed. *Jones*, 593 US at ___; 141 S Ct at 1320-1321 ("Because the Constitution does not require an on-the-record explanation of mitigating circumstances by the sentence in *death penalty cases*, it would be incongruous to require an on-the-record explanation of the mitigating circumstance of youth by the sentence in *life-without-parole cases*."). By extension, then, the Constitution also does not require an on-the-record explanation of the mitigating circumstances of youth in *term-of-years* cases.

We also find no requirement for an on-the-record articulation of how youth or the *Miller* factors affected a sentence in our caselaw. Youth matters in sentencing decisions involving juvenile offenders, and the trial court is responsible for tailoring a sentence to an individual defendant and for giving reasons for imposing each sentence in order to facilitate appellate review. *McFarlin*, 389 Mich 557; *People v Coles*, 417 Mich 523, 549; 339 NW2d 440 (1983), overruled on other grounds by *Milbourn*, 435 Mich at 635. However, like *Jones*'s observation about the Supreme Court's precedent, none of this Court's sentencing jurisprudence requires trial courts to fulfill these responsibilities by articulating *specific* factors on the record. Instead, our sentences must follow the principle of proportionality, which "requires 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse*, 500 Mich at 474, quoting *Milbourn*, 435 Mich at 636. "[S]entencing courts must justify the sentence imposed in order to facilitate appellate review." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015) (citation omitted). But never before have we imposed a requirement that a sentencing court give a detailed on-the-record explanation of one or more specific factors, and we do not impose such a requirement here.

The Court of Appeals previously considered the question before us and held that there is no constitutional mandate to make specific, on-the-record findings about the *Miller* factors, but that sentencing courts should be guided by the *Snow* factors, which necessarily includes the consideration of youth as a mitigating factor. *People v Wines*, 323 Mich App 343, 352; 916 NW2d 855 (2018), rev'd in part on other grounds 506 Mich 954 (2020). We affirm the Court of Appeals

holding in *Wines*, which "requires only that when the trial court exercises its discretion in sentencing a defendant that it consider the defendant's age" and is thus "consistent with the traditional penological goals expressed by this Court in [*Snow*]." *Wines*, 506 Mich 954, 958 (CLEMENT, J., concurring).

However, merely considering the mitigating qualities of youth within *Snow*'s sentencing criteria stops short of requiring trial courts to articulate a basis on the record to explain how youth affected the sentence imposed. We again look to *Jones* as a helpful guide to explain the holding in *Wines*. *Jones* explains:

> [A]n on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth. Jones's argument to the contrary rests on the assumption that meaningful daylight exists between (i) a sentencer's discretion to consider youth, and (ii) the sentencer's actual consideration of youth. But if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor. [*Jones*, 593 US at ___; 141 S Ct at 1319].

The Court of Appeals' decision in *Wines* is aligned with the sentiment expressed in *Jones*—which was another case in a long line of Supreme Court cases explaining that youth matters—as well as with Michigan sentencing caselaw and our present holding. Trial courts must consider youth as a mitigating factor in hearings conducted under MCL 769.25 or MCL 769.25a even when the defendant is sentenced to a term of years; however, this consideration need not be articulated on

the record. See *Wines*, 506 Mich at 958 (CLEMENT, J., concurring).[9] In other words, there is no authority that imposes a higher standard of articulation regarding youth beyond our general requirement that a trial court must adequately explain its sentence on the record in order to facilitate appellate review. *Lockridge*, 498 Mich at 392.

IV. APPLICATION

A. DOCKET NO. 157738

In *Boykin II*, the Court of Appeals held that consideration of Boykin's youth was unnecessary because *Miller* only pertained to defendants who are sentenced to serve life without the possibility of parole. *Boykin II*, unpub op at 3-4. Accordingly, the majority never addressed whether the trial court properly considered youth to be a mitigating factor when defendant was sentenced. In light of our holding, we vacate that opinion and remand to the Court of Appeals to consider that question.

B. DOCKET NO. 158695

In *Tate*, rather than rejecting Tate's arguments, the Court of Appeals applied *Wines*. *Tate*, unpub op at 6. The panel went on to identify ways in which it believed the trial court gave consideration to defendant's attributes of youth. For example, the trial court commented that " 'perhaps your age, and your maturity, were

[9] That said, nothing in this opinion deprives trial courts of the discretion to articulate how an offender's youth or the *Miller* factors apply to that particular offender's sentence. Rather, articulating how the court considered the defendant's youth when fashioning an appropriate sentence enhances an appellate court's ability to review the proportionality of that sentence.

working against you,' but it found that Tate 'knew exactly what [he] was doing.' " *Id*. at 7. And the panel added that the trial court "observed that Tate 'volunteered to participate in the assassination of [the victim] . . . .' " *Id*. Assuming that these statements comply with our requirement that youth must be a mitigating factor, they appear to only represent a small portion of the record established by the sentencing court.[10] It bears repeating that youth is a *mitigating* factor at sentencing, not an aggravating factor.[11] Although trial courts are not required to make a record that they considered each mitigating factor listed in *Miller* when sentencing these defendants, whether these statements and the totality of the record established by the

[10] The trial court stated:

> You participated in this murder, then you ran and hid.
>
> You boasted, subsequence [sic] to the murder, that the Police couldn't find you, the Police couldn't get you.
>
> This Court, now having had the opportunity to, to see this circumstance three times, cannot comprehend why you would volunteer to participate in this execution.
>
> Was it a thrill seeking? Was it an opportunity to be the man, and enhance your reputation, in your community?
>
> I have no idea.
>
> But the fact is, that perhaps your age, and your maturity, were working against you.
>
> But in our civilized society, you're [sic] actions, despite your age, do not make your actions forgivable.
>
> Once again, you knew exactly what you were doing.

[11] The Supreme Court left open the door to the possibility that a defendant could raise a successful Eighth Amendment challenge if a trial court "expressly refuses *as a matter of law* to consider relevant mitigating circumstances." *Jones*, 593 US at ___ n 7; 141 S Ct at 1320 n 7. A defendant may also raise a successful sentencing challenge if the sentencing court refuses to consider relevant mitigating factors or circumstances as mitigating.

trial court comply with our requirement that a trial court consider youth to be a mitigating factor is a close question deserving of additional appellate review. Thus, we vacate Part V of the Court of Appeals opinion, which discusses Tate's sentence, and remand to the Court of Appeals for reconsideration in light of this opinion.

V. CONCLUSION

Sentencing courts must consider youth as a mitigating factor at sentencing hearings conducted under MCL 769.25 or MCL 769.25a when the defendant is sentenced to a term of years. However, the court's consideration of youth need not be articulated on the record. Therefore, the Court of Appeals was correct when it held that there is no constitutional mandate to make specific findings on the record as to the *Miller* factors but that sentencing courts should be guided by the *Snow* factors, which necessarily include consideration of youth as a mitigating factor. *Wines*, 323 Mich App at 352. Because it is unclear whether the trial courts properly considered youth to be mitigating in either of these consolidated cases, yet the Court of Appeals affirmed the trial courts' sentencing decisions, we vacate the portions of both Court of Appeals opinions discussing defendants' sentencing challenges, and we remand both cases to the Court of Appeals for further consideration not inconsistent with this opinion.

MCCORMACK, C.J., and CLEMENT (except as to Part IV(B)), CAVANAGH, and WELCH, JJ., concurred with BERNSTEIN, J.

MCCORMACK, C.J. (*concurring*). I concur fully in the majority opinion. I write separately to say more about the majority's conclusion that the Michigan Constitution does not contain a requirement that a trial court articulate on the record how it considered the mitigating characteristics of youth when it sentences a juvenile defendant to a sentence other than life without the possibility of parole. The United States Supreme Court has made clear that "children are different" for sentencing purposes and that sometimes, a sentencing court may not constitutionally sentence a juvenile without considering the mitigating characteristics of youth. *Miller v Alabama*, 567 US 460, 480; 132 S Ct 2455; 183 L Ed 2d 407 (2012); see also *Graham v Florida*, 560 US 48, 76; 130 S Ct 2011; 176 L Ed 2d 825 (2010); *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005). Exactly how that principle applies in interpreting the Michigan Constitution has not been explored in these cases and is therefore left for another day.

The Michigan Constitution played a backseat role throughout these cases' progression through the trial and appellate courts; it was not until defendant Tyler M. Tate's supplemental brief in this Court that it made its first appearance. And then, Tate argued that his 40-year minimum sentence was disproportionate under Article 1, § 16 of the Michigan Constitution and our decision in *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992). But *Bullock*'s four-factor test for evaluating the proportionality of a particular sentence does not address Tate's argument that Article 1, § 16 requires an on-the-record explanation of how the mitigating characteristics of youth affected a trial court's sentencing decision for the sentence imposed to be constitutional. See, e.g., *State v Null*, 836 NW2d 41, 74 (Iowa, 2013) ("We think the direction from the Supreme Court

that trial courts consider everything said about youth in *Roper*, *Graham*, and *Miller* means more than a generalized notion of taking age into consideration as a factor in sentencing. . . . [W]e conclude article I, section 17 [of the Iowa Constitution] requires that a district court recognize and apply the core teachings of *Roper*, *Graham*, and *Miller* in making sentencing decisions for long prison terms involving juveniles."). Tate's argument is therefore a poor fit with the authority he cites.

But we know youth matters in sentencing under the state Constitution as well as the federal Constitution. See *People v Stovall*, 510 Mich 301; 987 NW2d 85 (2022). While neither the statutory scheme nor the federal Constitution categorically requires an on-the-record articulation of how the characteristics of youth affect a sentencing court's decision, the Court correctly rules that sentencing courts must consider those characteristics and treat them as mitigating. A trial court's failure to do so explicitly on the record, notwithstanding no *categorical* rule requiring it, stands a high chance of rendering its sentence a violation of Article 1, § 16, and therefore necessarily an abuse of its discretion. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013) ("A trial court necessarily abuses its discretion when it makes an error of law.").

And whether a categorical rule may be constitutionally required under Article 1, § 16 is a question left for another day. The principles animating *Miller*, *Graham*, and *Roper* apply no less forcefully in this context. Those principles, together with our precedent requiring individualized sentencing, see *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973), may render a sentence where the effect of youth is unexplained at

such high risk of violating those principles as to be constitutionally impermissible. See generally *Null*, 836 NW2d at 74.

CLEMENT, J. (*concurring in part and dissenting in part*). Consistently with my concurring statement in *People v Wines*, 506 Mich 954, 958 (2020) (CLEMENT, J., concurring), I agree with the majority that trial courts are required to consider the mitigating effects of youth when sentencing a juvenile to a term-of-years sentence because youth affects the traditional penological goals that guide a sentencer's discretion. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Within this context, the United States Supreme Court's discussion of the mitigating effects of youth in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), is relevant in understanding how youth relates to those traditional penological goals. Neither this decision nor *Wines* holds that the Eighth Amendment requires specific consideration of each attribute of youth identified in *Miller*, nor does either decision require that the trial court make explicit findings as to each of those attributes on the record. Although this Court has chosen elsewhere to extend *Miller*, see, e.g., *People v Stovall*, 510 Mich 301; 987 NW2d 85 (2022); *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022), the majority opinion in this case does not do so, and accordingly, I concur with its holding that the mitigating effects of youth must be considered during term-of-years juvenile sentencing.

While I agree with the majority's iteration of this general rule, I respectfully dissent as to the majority's application of that rule to defendant Tate. At Tate's sentencing, the trial court listened to defense counsel's youth-based leniency arguments and noted that it had also reviewed Tate's presentence investigation report,

which contained additional material about Tate's age, family environment, and criminal history. The trial court acknowledged that "perhaps [Tate's] age, and [his] maturity, were working against [him]," but also highlighted Tate's volunteered and intentional role in the murder, his flight from and lengthy evasion of law enforcement, his lack of remorse, and his "violent, deplorable" nature. On the basis of this full consideration of Tate's background and the nature of the offense, the trial court sentenced him to a 40- to 60-year term of imprisonment. The trial court's record of its decision-making sufficiently justified the sentence imposed in order to facilitate appellate review, the sole articulation requirement mandated by our sentencing jurisprudence. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

Despite this, the majority now chooses to remand this case to the Court of Appeals for reconsideration, explaining that the trial court's comments "appear to only represent a small portion of the record established by the sentencing court" and that "whether these statements and the totality of the record established by the trial court comply with our requirement that a trial court consider youth to be a mitigating factor is a close question deserving of additional appellate review." In my opinion, this disposition on the basis of the brevity of the trial judge's statements deeply muddies—if not outright contradicts—the majority's holding that no statutory or constitutional authority compels the trial court to make an on-the-record explanation of its consideration of youth. To the extent that the majority may believe that Tate is deserving of a shorter minimum sentence because of the mitigating effects of youth (i.e., that the trial court weighed the mitigating effects of youth incorrectly), that is a proportionality issue that should be addressed by this Court and not

remanded to the Court of Appeals, which has already considered and rejected Tate's proportionality argument.

ZAHRA, J. (*dissenting*). I dissent from the majority's decision. The majority opinion concludes that "[s]entencing courts must consider youth as a mitigating factor at sentencing hearings conducted under MCL 769.25 or MCL 769.25a when the defendant is sentenced to a term of years," but that "the court's consideration of youth need not be articulated on the record."[1] To the extent the majority opinion holds that a juvenile homicide offender's youth operates as a mitigating factor for purposes of sentencing, I take no exception, as "*Miller* [*v Alabama*] repeatedly described youth as a sentencing factor akin to a mitigating circumstance."[2] But the majority opinion's holding is not so narrow. Instead, the majority opinion concludes more broadly that when sentencing a juvenile homicide offender to a term of years under MCL 769.25 and MCL 769.25a, sentencing courts are *required* to consider the mitigating qualities of youth within the penological objectives outlined in *People v Snow*[3] and that a failure to adequately consider those mitigating qualities will result in reversal. I do not agree with this broader holding, as it lacks precedential support and runs counter to the guidance provided by the Supreme Court of the United States that "an on-the-record

[1] *Ante* at 196.

[2] *Jones v Mississippi*, 593 US ___, ___; 141 S Ct 1307, 1315; 209 L Ed 2d 390 (2021), citing *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

[3] *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972) (providing the following penological objectives of sentencing: (1) "reformation of the offender," (2) "protection of society," (3) punishment of the offender, and (4) "deterrence of others from committing like offenses").

sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth" because a sentencer that has the discretion to consider a defendant's youth "necessarily *will* consider the defendant's youth . . . ."[4] I would not upset our Legislature's policy choice of declining to extend *Miller*—which until now has only applied to this state's juvenile homicide offenders facing life without parole—to term-of-years sentences imposed under MCL 769.25 and MCL 769.25a. Instead, I would hold that traditional sentencing considerations apply to these sentencing hearings; that is, when deciding what constitutes an appropriate term-of-years sentence for a juvenile homicide offender, a sentencing court should ultimately be guided by the principle of proportionality, which aims to tailor the sentence to the particular offense and offender before it and which *may* require the court to consider how the offender's age correlates with the sentence imposed. Applying that standard, I would affirm each defendant's sentence, as both sentencing courts adequately explained the sentences imposed in relation to each defendant and their offenses and, therefore, did not abuse their discretion in sentencing defendants to 40 to 60 years' imprisonment.

I. APPLICABLE LAW

A. UNITED STATES SUPREME COURT PRECEDENT

In 2012, the Supreme Court of the United States held in *Miller* that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel

[4] *Jones*, 593 US at ___; 141 S Ct at 1319.

and unusual punishments.' "[5] The Supreme Court explained that "children are constitutionally different from adults for purposes of sentencing," citing the following three grounds:

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.[6]

Given these asserted differences, the *Miller* Court concluded that subjecting juveniles to the same mandatory life-without-parole sentence applicable to adults contravened the "foundational principle" from the Court's prior decisions in *Roper v Simmons*[7] and *Graham v Florida*[8]: "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[9] Unlike *Graham* and *Roper*, however, the Court in *Miller* did "not categorically bar a penalty for a class of offenders or

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[5] *Miller*, 567 US at 465.

[6] *Id*. at 471 (citations, quotation marks, ellipses, and brackets omitted).

[7] *Roper v Simmons*, 543 US 551, 578; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (holding that the Eighth Amendment bars the imposition of the death penalty on offenders under the age of 18).

[8] *Graham v Florida*, 560 US 48, 74; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (holding "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole").

[9] *Miller*, 567 US at 474.

type of crime[.]"[10] Instead, *Miller* "allowed life-without-parole sentences for defendants who committed homicide when they were under 18, but only so long as the sentence is not mandatory—that is, only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment."[11] Accordingly, before imposing life without parole on a juvenile homicide offender, a sentencing court must have the opportunity to consider: "[a defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; whether "he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation . . . ."[12] These are commonly referred to as the *Miller* factors.

Four years later, in *Montgomery v Louisiana*, the Supreme Court held that *Miller* applies retroactively to juvenile homicide offenders whose convictions and sentences were final when *Miller* was decided.[13] Yet

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[10] *Id*. at 483.

[11] *Jones*, 593 US at ___; 141 S Ct at 1314 (emphasis omitted), quoting *Miller*, 567 US at 476.

[12] *Miller*, 567 US at 477-478.

[13] *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016).

Montgomery did nothing to change the limited scope of *Miller*'s holding. As the Supreme Court recently stated in *Jones v Mississippi*, "*Miller* cited *Roper* and *Graham* for a simple proposition: Youth matters in sentencing. And because youth matters, *Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence . . . ."[14] The Court in *Jones* further explained that "an on-the-record sentencing explanation . . . is not necessary to ensure that a sentencer considers a defendant's youth . . . ."[15] At bottom, "*Miller* required a discretionary sentencing procedure" only for those juvenile homicide offenders subject to life without parole, and "the Court did not suggest that those discretionary sentencing regimes required some kind of sentencing explanation."[16]

B. MICHIGAN LAW

In response to *Miller*, our Legislature enacted MCL 769.25 and MCL 769.25a.[17] Under these statutes, if the prosecuting attorney files a motion seeking imposition of a life-without-parole sentence on a juvenile homicide offender convicted of certain enumerated offenses, including first-degree murder, the sentencing court must conduct a hearing on that motion as part of the sentencing process.[18] At that hearing, the sentencing court is statutorily required to "consider the factors

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[14] *Jones*, 593 US at ___; 141 S Ct at 1316.

[15] *Id*. at ___; 141 S Ct at 1319.

[16] *Id*. at ___, ___; 141 S Ct at 1317, 1320.

[17] MCL 769.25a was enacted in anticipation that the United States Supreme Court would hold that *Miller* applies retroactively. It provides essentially the same substantive relief as MCL 769.25.

[18] MCL 769.25(2), (3), and (6); MCL 769.25a(4)(b).

listed in [*Miller*]" and to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed."[19] If the prosecutor does not seek life without parole, however, the sentencing court is not required to conduct such a hearing. Instead, the statutes require the court to sentence the offender to a term of years in which the minimum sentence is no less than 25 years and no more than 40 years and the maximum sentence is no less than 60 years.[20] That is, absent a motion from the prosecutor seeking life without parole, there is no statutory obligation for the sentencing court to consider the *Miller* factors, nor is the court required to state on the record the aggravating and mitigating circumstances the court considered in sentencing the juvenile homicide offender to a term of years.

The lack of statutory guidance for sentencing courts imposing term-of-years sentences under MCL 769.25 and MCL 769.25a does not mean that those courts may simply rubber-stamp the maximum allowable sentence under those statutes. Rather, this Court in *People v Milbourn* stated that "with regard to the judicial selection of an individual sentence within the statutory minimum and maximum for a given offense," judicial

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[19] MCL 769.25(6); MCL 769.25(7). The trial court is permitted to "consider any other criteria relevant to its decision, including the individual's record while incarcerated," MCL 769.25(6), as well as "evidence presented at trial," MCL 769.25(7).

[20] MCL 769.25(4), (9); MCL 769.25a(4)(c). A juvenile homicide offender benefiting from *Montgomery*'s holding that *Miller* applies retroactively and who is not subject to a life-without-parole sentence, like Boykin, would actually receive a maximum sentence of exactly 60 years, MCL 769.25a(4)(c), whereas a juvenile whose convictions and sentences were final after *Miller*, like Tate, would receive a maximum sentence of "not less than 60 years," MCL 769.25(9). Both Tate and Boykin received 40- to 60-year sentences.

sentencing discretion is to be exercised according to the "principle of proportionality," which "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."[21] In order "to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing . . . , the judge, of course, must take into account the nature of the offense and the background of the offender."[22] Further, in order to facilitate appellate review of a sentence, a sentencing court must justify the sentence imposed by articulating the criteria on which it relied to fashion a sentence that is proportionate to the offense and the offender.[23] Whether the sentence imposed violates the principle of proportionality is reviewed for an abuse of discretion, which occurs when the outcome falls outside the range of reasonable and principled outcomes.[24]

II. ANALYSIS

The majority opinion holds that sentencing courts are required to consider the mitigating qualities, circumstances, and factors of youth within the penologi-

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[21] *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). See also *People v Steanhouse*, 500 Mich 453, 459-460, 474-475; 902 NW2d 327 (2017).

[22] *Milbourn*, 435 Mich at 651.

[23] *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015) ("[S]entencing courts must justify the sentence imposed in order to facilitate appellate review."), citing *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983) (requiring "that the trial court state on the record which criteria were considered and what reasons support the court's decision regarding the length and nature of punishment imposed"), overruled in part on other grounds by *Milbourn*, 435 Mich 630.

[24] *People v Skinner*, 502 Mich 89, 131-132; 917 NW2d 292 (2018); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

cal objectives outlined in *Snow* (reformation, protection, punishment, and deterrence) when sentencing a juvenile homicide offender to a term-of-years sentence under MCL 769.25 and MCL 769.25a. It stresses, however, that an on-the-record explanation of those mitigating qualities is not necessary and claims that its holding falls short of requiring courts to articulate how the *Miller* factors—which the Supreme Court has also characterized as "mitigating qualities," "mitigating circumstances," "mitigating factors," and "distinctive attributes" of youth[25]—affected the term-of-years sentence. This holding, convoluted as it is, lacks legal support of any kind: it is not required by the United States or Michigan Constitution; it is not required by statute; and it is not required by precedent.

The majority opinion derives its holding from *Miller*, but the Supreme Court's holding in *Miller* was limited: it corrected the constitutional infirmity of sentencing schemes *mandating life without parole* for juvenile homicide offenders by requiring that sentencers be given the *opportunity to consider* the mitigating qualities of youth and the *discretion* to impose a lesser sentence.[26] Nowhere in *Miller*—or *Roper*, *Graham*, or *Jones*—did the Court state that sentencers *must* con-

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[25] *Miller*, 567 US at 472, 476, 489 (quotation marks and citations omitted).

[26] *Id*. at 479 (holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," and that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment"). See also *Jones*, 593 US at ___; 141 S Ct at 1316 ("[T]he *Miller* Court stated that a judge or jury must have the opportunity to consider the defendant's youth and must have discretion to impose a different punishment than life without parole.") (quotation marks and citation omitted); *Skinner*, 502 Mich at 120 ("*Miller* simply held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment and that before

sider the distinctive attributes of a juvenile homicide offender's youth when imposing a sentence *less than life without parole*. Although the Court in *Jones* suggested that the broader rationale of *Roper*, *Graham*, and *Miller* is that "youth matters in sentencing,"[27] their holdings are limited to the specific sentences before the Court. In any event, the proposition that youth matters in sentencing is hardly a novel statement of blackletter law that can be first attributed to the *Roper-Graham-Miller* trilogy. *Miller* itself stated that the differences between juvenile and adult offenders are commonsensical and confirm what " 'any parent knows,' "[28] and society has long recognized that an offender's age may warrant a less severe punishment.[29] I would not use the "simple proposition"[30] that youth matters in sentencing as a basis to extend *Roper*, *Graham*, and *Miller* beyond their own terms as the majority opinion does here.

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such a sentence can be imposed on a juvenile, the sentencer must consider the mitigating qualities of youth.").

[27] *Jones*, 593 US at ___; 141 S Ct at 1316.

[28] *Miller*, 567 US at 471, quoting *Roper*, 543 US at 569.

[29] See *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995) (stating that a defendant's age is a relevant factor to determining whether a departure from the guidelines minimum sentence range is warranted and that "courts often cite the young age of a defendant as a reason to deviate from a minimum sentence"). See also *Goodwin v Iowa District Court for Davis Co*, 936 NW2d 634, 652 (Iowa, 2019) (McDonald, J., concurring) (explaining that the neuroscience evidence supporting the claim that juvenile offenders are less culpable than adult offenders "does not tell us something new for which the law did not already account"); see also *id*., quoting Sanders, ed, *Juvenile Offenders for a Thousand Years: Selected Readings from Anglo-Saxon Times to 1900* (Chapel Hill: University of North Carolina Press, 1970), p xviii (" '[A]s far back as written records go children who have broken the law have been treated on the whole more leniently than have adult offenders.' ").

[30] *Jones*, 593 US at ___; 141 S Ct at 1316.

The majority's holding also has no basis in this state's jurisprudence. MCL 769.25 and MCL 769.25a do not require sentencing courts to consider mitigating qualities of youth when sentencing a juvenile homicide offender to a term of years. In fact, the Legislature requires courts to consider *Miller*'s mitigating factors only when the sentence sought is life without parole. The Legislature's omission of this requirement when the sentence sought is a term of years is presumed to be intentional,[31] and it represents a policy choice made by the Legislature that the judiciary may not second-guess or override.[32] Further, by enacting MCL 769.25 and MCL 769.25a, the Legislature put in place a scheme that necessarily accounts for a juvenile homicide offender's youth, even when the sentence imposed is a term of years. That is, the prosecution's decision not to file a motion seeking life without parole means that the defendant is benefiting from *Miller* by receiving a term-of-years sentence and not being subject to the law's harshest term of imprisonment.[33] Thus, not only are MCL 769.25 and MCL 769.25a "constitution-

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[31] *People v Lewis*, 503 Mich 162, 167; 926 NW2d 796 (2018).

[32] See *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999) ("[O]ur judicial role precludes imposing different policy choices than those selected by the Legislature . . . ."); *People v Morris*, 450 Mich 316, 336; 537 NW2d 842 (1995) ("[J]udicial misgivings regarding the wisdom of the policy do not provide a legal foundation for overriding legislative intent. . . . The wisdom of the policy is a political question to be resolved in the political forum. To reach a contrary result would be simply to repudiate the legislative choice.").

[33] See, e.g., *James v United States*, 59 A3d 1233, 1238 (DC, 2013) (explaining that the sentencing statute necessarily takes into account juvenile homicide offenders' youth and its attendant characteristics "by limiting the minimum sentence to thirty years for offenders under the age of eighteen at the time of their offense, as compared to life imprisonment without opportunity for release which is available against adults").

ally necessary and constitutionally sufficient,"[34] the manner by which these statutes operate ensures that a juvenile homicide offender's youth is being taken into account at sentencing.

Moreover, while courts fashioning a proportionate sentence must take into account an offender's background, which would include the offender's age, there is "no basis in *Milbourn* for a requirement that the trial judge tailor every defendant's sentence in relationship to the defendant's age."[35] "A judge *may* . . . consider a defendant's age at sentencing in deciding whether the sentence about to be imposed is proper, just as the judge considers the recommended range under the guidelines and any other factors not expressly prohibited by law."[36] Simply put, "*Miller* mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence."[37] Accordingly, *Miller* does not alter this state's sentencing jurisprudence for juvenile homicide offenders facing a lesser sentence.

Given that sentencing courts are not required to articulate an on-the-record explanation of how youth or the *Miller* factors affect a term-of-years sentence imposed under MCL 769.25 or MCL 769.25a, there is no legal basis for affirming the Court of Appeals decision in *People v Wines*.[38] Despite recognizing that

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[34] *Jones*, 593 US at ___; 141 S Ct at 1313.

[35] *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997).

[36] *Id*. at 259 (emphasis added).

[37] *Jones*, 593 US at ___; 141 S Ct at 1314, quoting *Miller*, 567 US at 483.

[38] *People v Wines*, 323 Mich App 343; 916 NW2d 855 (2018), rev'd in part on other grounds 506 Mich 954 (2020).

"there is no *constitutional* mandate requiring the trial court to specifically make findings as to the *Miller* factors except in the context of a decision whether to impose a sentence of life without parole," the Court of Appeals in *Wines* nonetheless concluded that "when the sentence of life imprisonment without parole is not at issue, the [sentencing] court should be guided by a balancing of the *Snow* objectives and in that context is required to take into account the attributes of youth, such as those described in *Miller*."[39] According to *Wines*, "[t]he process of properly balancing [the *Snow*] objectives in the case of a minor defendant necessitates consideration of the distinctive attributes of youth," and "a failure to consider the distinctive attributes of youth, such as those discussed in *Miller*," when imposing a term-of-years sentence under MCL 769.25 and MCL 769.25a amounts to an abuse of discretion warranting reversal.[40]

There are a number of issues with the Court of Appeals' holding in *Wines* that the majority opinion fails to address. For example, *Wines* was incorrect to suggest that *Miller*'s holding requires courts to make specific findings regarding the *Miller* factors when deciding whether to impose life without parole—a requirement the Supreme Court of the United States and this Court have rejected.[41] Further, *Miller*'s *only* holding was that mandatory life without parole for juveniles violates the Eighth Amendment. Thus, there is no

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[39] *Id*. at 352.

[40] *Id*. at 351-352.

[41] See *Jones*, 593 US at ___; 141 S Ct 1307 (rejecting the argument that *Miller* imposed a formal fact-finding requirement); *Skinner*, 502 Mich 89 (same).

basis to apply it outside that constitutional context.[42] *Wines* also failed to recognize that *Snow*'s penological objectives "are not the only relevant criteria" for determining an appropriate sentence and that they do not instruct trial courts "on every factor they must consider when imposing [a] sentence."[43] And nowhere in *Wines* did the panel discuss the principle of proportionality. Finally, the Court of Appeals' holding in *Wines* is unclear as to what exactly courts are required to consider when life without parole is not at issue. Particularly, it failed to explain whether " 'taking into account the attributes of youth' [is] distinguishable in some way from considering the *Miller* factors and, if so, what is that distinction?"[44] The majority opinion adds to the confusion left by *Wines*'s holding by requiring sentencing courts to consider "the mitigating qualities of youth within *Snow*'s sentencing criteria"[45]—which do not represent an exhaustive list of criteria to be considered in fashioning an appropriate sentence—but failing to explain how a court's consideration of mitigating qualities within *Snow*'s framework differs from consideration of the mitigating factors articulated in *Miller*.[46]

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[42] Indeed, nothing in the majority's opinion suggests a 40- to 60-year sentence for a juvenile homicide offender is unconstitutional.

[43] *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987), citing *Coles*, 417 Mich 550.

[44] *People v Wines*, 506 Mich 954, 957 (2020) (MARKMAN, J., concurring in part and dissenting in part) (brackets omitted).

[45] *Ante* at 193.

[46] Even the majority opinion's modified-*Snow* framework leaves many questions unanswered. Are sentencing courts required to consider each of the modified *Snow* factors when sentencing a juvenile homicide offender to a term of years under MCL 769.25 and MCL 769.25a? Is a discussion of those factors alone sufficient for sentencing courts to provide an adequate consideration of youth? What if, instead, the

The majority opinion contends that *Jones* provides helpful guidance to explain the holding of *Wines*. I agree we should heed the words of *Jones*, particularly its discussion of what *Miller* requires (a discretionary sentencing procedure for juvenile homicide offenders subject to life without parole) and does not require (an on-the-record consideration of the offender's youth and its attendant characteristics). Yet the majority opinion fails to do just that by affirming *Wines* and *requiring* sentencing courts to consider a juvenile homicide offender's youth as a mitigating factor when imposing a term-of-years sentence under MCL 769.25 and MCL 769.25a. As the Court stated in *Jones*, "[I]f the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth," as "it would be all but impossible for a sentencer to avoid considering that mitigating factor" when tasked with sentencing a juvenile homicide offender.[47] In other words, there is no need to *require* sentencing courts to consider a juvenile homicide offender's youth in whatever manner the majority opinion now demands; youth is necessarily taken into account by giving courts *the discretion* to do so. Also, nothing prevents defense counsel from arguing that mitigating factors of youth favor a lenient sentence. The majority opinion simply pays lip service to *Jones* and, instead, reads as though youth is the only factor sentencing courts are to consider when sentencing juvenile homicide offenders. This Court has rejected that notion, explaining—in the context of whether to impose a life-without-parole sentence—that while "an

sentencing court addresses some or all of the *Miller* factors and fails to address some or all of the *Snow* factors? Under what circumstance is a sentencing court's consideration of a juvenile homicide offender's youth enough to satisfy appellate review of the term-of-years sentence?

[47] *Jones*, 593 US at ___; 141 S Ct at 1319.

offender's age is likely to be given significant weight in the court's deliberations and may well constitute the single best factor for ascertaining whether a *Miller*-benefited offender would actually gain relief," it is not "the exclusive factor that the trial court should consider in imposing a sentence on a juvenile homicide offender."[48] Accordingly, not only does a juvenile homicide offender necessarily benefit from *Miller* by receiving a term-of-years sentence instead of life without parole, but contrary to the majority opinion's suggestion, the "mitigating qualities" and "distinctive attributes" of youth discussed in *Miller* do *not* represent an exclusive or exhaustive list of the criteria sentencers are to consider for *all* juvenile homicide offenders.

In sum, there exists no constitutional, statutory, or judicial directive *requiring* sentencing courts to consider the mitigating qualities of youth when imposing term-of-years sentences under MCL 769.25 and MCL 769.25a. Absent such a directive, I would not extend *Miller*'s limited constitutional holding in whatever manner the majority opinion now extends it by affirming the Court of Appeals' decision in *Wines*. Instead, I would hold that traditional sentencing considerations apply to these sentencing hearings. That is, when deciding what constitutes an appropriate term-of-years sentence for a juvenile homicide offender, a sentencing court should ultimately be guided by the principle of proportionality, which aims to tailor the sentence to the particular offense and offender before it and which *may* require the court to consider how the offender's age correlates with the sentence imposed. By extending *Miller* to a whole new class of sentences, the

[48] *People v Carp*, 496 Mich 440, 520; 852 NW2d 801 (2014), cert gtd and opinion vacated on other grounds sub nom *Carp v Michigan*, 577 US 1186 (2016).

majority opinion undermines the policy choices made by the Michigan Legislature in enacting MCL 769.25 and MCL 769.25a, which do not require sentencing courts to consider the *Miller* factors, the "distinctive attributes of youth," or "the mitigating qualities of youth" when imposing a term-of-years sentence.

III. APPLICATION

Tellingly, the majority opinion does not even attempt to apply its holding to the facts of these two cases—at least not with any meaningful guidance. In *Boykin*, the majority opinion concludes that the Court of Appeals failed to address whether the sentencing court properly considered youth as a mitigating factor and that the panel instead held that consideration of Boykin's youth was unnecessary because *Miller* only applies to defendants sentenced to life without parole. Contrary to the majority opinion's assertion, the Court of Appeals did not hold that consideration of Boykin's youth was unnecessary; it rejected Boykin's sweeping argument that *Miller* requires juveniles to be considered differently for purposes of sentencing and that the sentencing court was required to consider the *Miller* factors. Given that *Miller* only applies to juvenile homicide offenders facing life without parole, and because MCL 769.25 and MCL 769.25a already treat juvenile homicide offenders differently than adult offenders, the panel correctly rejected Boykin's argument. Further, the panel *did* actually address the sentencing court's consideration of Boykin's youth as a mitigating factor in the context of *Miller*, stating:

> Though not mandated by *Miller*, the trial court actually did consider the *Miller* factors when resentencing defendant. The trial court stated that it was considering all the *Miller* factors and specifically mentioned its consideration

> of defendant's psychological evaluations, defendant's childhood, and his misconducts while in prison involving intoxicating substances and weapons. Evaluating these factors, the trial court determined that defendant's youth and immaturity were not an excuse for his conduct, and that "there was nothing to suggest here anything other than this was a cold, calculated, premeditated killing of an innocent human being who represented no threat to defendant."[49]

The sentencing court also incorporated the penological objectives into its sentencing, stating in its conclusion that "[b]ased on everything presented . . . , confinement is necessary for punishment, for the protection of this community, and the hope of Mr. Boykin's rehabilitation in a more controlled environment." In light of the sentencing court's express incorporation of the *Miller* factors, its extensive discussion of how those factors affected the sentence imposed, and its consideration of *Snow*'s penological objectives, it is difficult to see what more the sentencing court could have done to warrant an affirmance of Boykin's sentence.

Boykin argues that the sentencing court did not consider his youth as a mitigating factor. Boykin's argument is largely based on the court's comments that he was a mere 80 days shy of turning 18 when he committed the murder and that he "certainly was of a mature age and cannot blame youth or immaturity as an excuse for this conduct." Boykin's argument lacks merit for several reasons. First, when imposing its sentence, the court expressly incorporated and considered the *Miller* factors, which are mitigating by nature.[50] Second, *Roper* recognized that some juveniles

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[49] *People v Boykin*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2018 (Docket No. 335862), p 4 n 2 (brackets omitted).

[50] See *Skinner*, 502 Mich at 115 ("It is undisputed that all of [the *Miller*] factors are mitigating factors.").

"have already attained a level of maturity some adults will never reach,"[51] and *Miller* contemplated sentencers considering a juvenile homicide offender's age as compared to other juveniles.[52] Accordingly, the sentencing court's reference to Boykin's age in proximity to turning 18 and its statement that he "certainly was of a mature age" is consistent with the Supreme Court's recognition that not all juveniles are necessarily immature. Third, the court's statement that Boykin "cannot blame youth or immaturity as an excuse for this conduct" is not the equivalent of refusing, as a matter of law, to consider his youth as a mitigating factor; rather, the court was simply weighing Boykin's youth and one of its hallmark characteristics against defendant's intentional homicidal acts.[53] Although youth is undisputedly a mitigating factor, it does not serve as a justification for committing society's most heinous crime. And, as detailed by the sentencing court, Boykin's offense was indeed heinous. Boykin was the shooter and the aggressor; he brought a gun to a fistfight that he was not involved in; he shot the victim

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[51] *Roper*, 543 US at 574.

[52] *Miller*, 567 US at 477, 480 n 8 (explaining that sentencing schemes mandating life without parole demanded that "every juvenile . . . receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one"—and therefore requiring that sentencers "take into account the differences among defendants and crimes" to remedy the constitutional problem with those schemes).

[53] See *Jones*, 593 US at ___; 141 S Ct at 1320 n 7 (contrasting a potentially viable Eighth Amendment claim when the sentencer "refuses as a matter of law to consider the defendant's youth" with a sentencer "deeming the defendant's youth to be outweighed by other factors or deeming the defendant's youth to be an insufficient reason to support a lesser sentence under the facts of the case," which is permissible).

in the back three or four times as the victim tried to run away; and he admitted trying to fire the gun as it was pressed against the victim's cheek. When the gun jammed, Boykin instead kicked the victim repeatedly as he lay dying on the sidewalk before fleeing the scene. In short, the sentencing court considered Boykin's background and his youth as mitigating factors but concluded that the aggravating nature of the homicide supported a sentence of 40 to 60 years' imprisonment. This was not an abuse of discretion.

In *Tate*, the majority opinion recognizes that the sentencing court expressly considered Tate's youth but states that the court's comments represent only a small portion of the record and suggests that more is required to comply with the majority opinion's requirement that sentencing courts consider youth as a mitigating factor. This result is puzzling for a number of reasons. First, it contradicts the majority opinion's own holding that sentencing courts need not even articulate their bases for considering an offender's youth when imposing a term-of-years sentence under MCL 769.25 and MCL 769.25a. Second, it turns a juvenile homicide offender's age into the preeminent consideration for courts imposing a term-of-years sentence under MCL 769.25 and MCL 769.25a, thereby downplaying the severity of the offender's crimes and the impact on the victims and their families. Third, it flies in the face of this state's own practice of affirming sentences when the sentencer has adequately explained the reasons for imposing its sentence.[54] Here, the record establishes

[54] See *Lockridge*, 498 Mich at 392, citing *Coles*, 417 Mich at 550. See also *Jones*, 593 US at ___; 141 S Ct at 1321 ("[W]hen a state judge imposes a sentence of imprisonment, particularly a lengthy sentence, the judge often will explain both the sentence and the judge's evaluation of any mitigating circumstances. . . . Even when state law requires a sentencer to supply reasons, many States do not impose a formulaic

that the sentencing court adequately explained the reasons for imposing its sentence and considered how Tate's youth affected that sentence. Tate's counsel advocated for a 25-year minimum sentence, focusing on Tate's young age and arguing that such a sentence would serve the traditional penological objectives. "Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it [was] all but impossible for [the sentencing court] to avoid considering that mitigating factor."[55] Moreover, as recounted by the Court of Appeals, the sentencing court explicitly considered Tate's youth and its attendant characteristics as a mitigating circumstance in fashioning its sentence:

> [T]he trial court considered Tate's youth and maturity level, commenting that "perhaps your age, and your maturity, were working against you," but it found that Tate "knew exactly what he was doing." Tate argues that the trial court failed to consider his lesser degree of culpability in comparison to [codefendant Brendon] Stanton-Lipscomb. Tate emphasizes that his role was "vastly different" than Stanton-Lipscomb, who was determined to shoot [Tyrell] Lane regardless of Tate's involvement. Contrary to what Tate argues, the trial court did discuss Tate's role in the offense in comparison to Stanton-Lipscomb's role. The court acknowledged that Tate "did not start the process of this execution," but it found that he was a willing participant in the plan to kill a young man, and that Tate played a "very active role in the cold and calculated assassination of a very young man, Mr. Lane."

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checklist of topics or a magic-words requirement with respect to particular mitigating circumstances. And appellate courts do not necessarily reverse merely because the sentencer could have said more about mitigating circumstances.").

[55] *Id*. at ___; 141 S Ct at 1319.

The court also observed that Tate "volunteered to participate in the assassination of Mr. Lane" after Taylor had refused to do so.

Further, Tate's efforts to distinguish his culpability from Stanton-Lipscomb's culpability are unavailing considering that they did not receive similar sentences. Stanton-Lipscomb received a mandatory sentence of life without parole. Although the prosecution could have requested a life-without-parole sentence for Tate, it did not. The differences in the culpability are, therefore, reflected in the decision not to pursue a sentence that would have subjected Tate to imprisonment for life without parole.[56]

Tate also asserts that he was "cooperative, articulate, and well-spoken during the presentence interview," and "expressed remorse for the victim's family." However, the trial court commented that it was struck by Tate's statement in the presentence report that "I have nothing to do with it." The court also found that Tate's post-offense messages on Facebook showed that he had no remorse and showed that he was "a violent, deplorable young man who will continue to be violent, if allowed to do so." Evidence at trial indicated that, after the offense, Tate eluded and lied to the police, and boasted about how he would not be captured for his role in the shooting.[57]

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[56] Although the sentencing court briefly stated that Tate was "no different than" two of his other codefendants—including Stanton-Lipscomb, who was 18 years old at the time of the shooting—that statement was not clearly erroneous. Taken in context, the court's statement is a reflection of its conclusion that Tate, despite being a juvenile, should be held equally accountable for his intentional acts. Indeed, Tate was convicted of first-degree premediated murder under an aiding-and-abetting theory, and our Legislature has chosen to treat offenders who aid and abet the commission of an offense in exactly the same manner as those who directly commit the offense. See MCL 767.39.

[57] *People v Tate*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 338360), pp 7-8 (brackets omitted).

Like Boykin, Tate argues that the sentencing court's comments demonstrate that it failed to consider his youth as a mitigating factor. Although the sentencing court did not expressly incorporate the *Miller* factors into its sentencing decision like the sentencing court in *Boykin*, the court's comments demonstrate that it explicitly considered Tate's youth and its attendant characteristics as mitigating evidence but that it nonetheless found that the aggravating circumstances of the crime, the active role Tate played in committing that crime, and Tate's postoffense conduct warranted a 40- to 60-year sentence. As in *Boykin*, this was not an abuse of discretion.

Ultimately, just as the Court in *Jones* rejected the defendant's argument "rest[ing] on the assumption that meaningful daylight exists between (i) a sentencer's discretion to consider youth, and (ii) the sentencer's actual consideration of youth,"[58] the majority opinion's holding suffers the same flaw: *requiring* sentencing courts to actually (and to a certain level of satisfaction) consider youth as a mitigating factor even when the sentencing scheme provides courts with *the discretion* to do just that. How youth militates for or against a certain sentence represents a moral judgment left to the discretion of the sentencing court.[59] Although "one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, . . . the key point remains that, in a case involving a murderer under [the age of] 18, a

[58] *Jones*, 593 US at ___; 141 S Ct at 1319.

[59] See *Skinner*, 502 Mich at 115 n 11, citing *Kansas v Carr*, 577 US 108, 119; 136 S Ct 633; 193 L Ed 2d 535 (2016) ("Whether mitigation exists . . . is largely a judgment call (or perhaps a value call) . . . . And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained.").

sentencer cannot avoid considering the defendant's youth if the sentencer has discretion to consider that mitigating factor."[60] MCL 769.25 and MCL 769.25a, as well as traditional sentencing principles, provide that discretion. And the record in each of these cases demonstrates that the sentencing judges—who presided over defendants' trials and thus were quite aware of their ages—appropriately exercised that discretion and considered defendants' youth in fashioning sentences proportionate to defendants and their offenses. Because neither court abused its discretion in sentencing defendants to 40 to 60 years' imprisonment, I would affirm those sentences.

IV. CONCLUSION

"Whether read broadly or narrowly, *Miller* creates a legal rule about life-without-parole sentences. And, whether one looks at [defendants'] sentence[s] formally or functionally, [they] did *not* receive a life-without-parole sentence."[61] "*Miller*'s holding simply does not cover a lengthy term of imprisonment that falls short of life without parole,"[62] and absent a constitutional, statutory, or judicial directive, I would not extend *Miller*'s reasoning to term-of-years sentences under MCL 769.25 and MCL 769.25a. Although the majority opinion purports to limit its holding to juvenile homicide offenders sentenced under those statutes, the implication of today's decision is far greater. Indeed, the majority opinion repeatedly suggests its ruling applies to *all* young offenders—regardless of the severity of their crimes, the sentence imposed, or their

[60] *Jones*, 593 US at ___; 141 S Ct at 1319-1320.

[61] *Atkins v Crowell*, 945 F3d 476, 478 (CA 6, 2019).

[62] *Id*.

juvenile status.[63] I disagree with this Court's continued extension of *Miller* beyond the life-without-parole context for juvenile homicide offenders.[64] For the reasons stated, I would not extend *Miller* to this whole new class of sentences. Instead, traditional sentencing considerations should apply when the sentence to be imposed on the juvenile homicide offender is less than life without parole. I would also affirm the 40- to 60-year sentences of these two youths. Because the majority concludes otherwise, I dissent.

VIVIANO, J., concurred with ZAHRA, J.

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[63] See *ante* at 189 ("Without considering the mitigating factors of youth, then, a sentence cannot adequately address the reformation of the offender."); *ante* at 189 ("Given that youth is a mitigating factor, it will inevitably factor into *Snow*'s four considerations.").

[64] See *People v Stovall*, 510 Mich 301, 332-362; 987 NW2d 85 (2022) (ZAHRA, J., dissenting, joined by VIVIANO and CLEMENT, JJ.) (disagreeing with the extension of *Miller*'s reasoning to parolable life sentences for juvenile homicide offenders); *People v Parks*, 510 Mich 225, 278-300; 987 NW2d 161 (2022) (CLEMENT, J., dissenting, joined by ZAHRA and VIVIANO, JJ.) (disagreeing with the extension of *Miller*'s reasoning to mandatory life-without-parole sentences for 18-year-old homicide offenders).

PEOPLE v PARKS

Docket No. 162086. Argued on application for leave to appeal March 2, 2022. Decided July 28, 2022.

Kemo K. Parks was convicted by a jury in the Genesee Circuit Court, Celeste D. Bell, J., of first-degree premeditated murder, MCL 750.316(1)(a); carrying a concealed pistol, MCL 750.227(2); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In 2016, Parks was 18 years old when his older cousin, Dequavion Harris, shot and killed the victim in the parking lot of a convenience store. According to a witness, prior to the murder, Parks and Harris spoke to each other in low voices and whispers in the back seat of a car parked outside the convenience store. Parks then gave a gun to Harris. Both men entered the store, and Harris exited to the parking lot a short time later. Parks remained inside the store. Thereafter, the victim, who was sitting in his car in the parking lot, was shot and killed. At trial, the prosecution's theory was that Harris and Parks planned to kill the victim in retaliation for the prior murder of Harris's cousin. The prosecution charged Parks with first-degree premeditated murder under an aiding-and-abetting theory. Parks was convicted and sentenced to mandatory life imprisonment without the possibility of parole for his conviction of first-degree murder, to be served consecutively with the mandatory two-year minimum for felony-firearm and concurrently to 24 to 60 months' imprisonment for his conviction of carrying a concealed pistol. Defendant appealed in the Court of Appeals, and the Court of Appeals consolidated his case with Harris's case. In an unpublished per curiam opinion issued August 13, 2020 (Docket Nos. 346586 and 346587), the Court of Appeals, MURRAY, C.J., and CAVANAGH and SWARTZLE, JJ., affirmed Harris's and Parks's convictions and sentences, with the exception of ordering a limited remand in Parks's appeal to redetermine a portion of Parks's restitution order. The Court of Appeals specifically rejected Parks's challenge to his sentence as cruel and/or unusual punishment under the federal and state Constitutions. Parks sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on the application, directing the parties to address whether the United States

Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), which held that imposing mandatory sentences of life imprisonment without the possibility of parole on homicide offenders who were under 18 years old at the time they committed the offense was prohibited by the Eighth Amendment, and *Montgomery v Louisiana*, 577 US 190 (2016), which held that *Miller* applied retroactively, should be applied to defendants who are over 17 years old at the time they commit a crime and who are convicted of murder and sentenced to mandatory life without parole under the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16, or both. 508 Mich 940 (2021).

In an opinion by Justice WELCH, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Mandatorily subjecting 18-year-old defendants convicted of first-degree murder to a sentence of life imprisonment without the possibility of parole violates the principle of proportionality derived from the Michigan Constitution and thus constitutes unconstitutionally cruel punishment under Const 1963, art 1, § 16; Parks's automatic sentence of life without parole was unconstitutional; and while a judge can still sentence an 18-year-old to life without parole, Parks and other 18-year-old defendants convicted of first-degree murder are entitled to the full protections that exist within the individualized sentencing procedure of MCL 769.25 prior to that determination.

1. The Eighth Amendment of the United States Constitution provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Article 1, § 16 of the 1963 Michigan Constitution prohibits cruel *or* unusual punishment; therefore, Michigan's provision is broader than the federal Eighth Amendment. The United States Supreme Court in *Miller* held that mandatory life without parole for a juvenile convicted of a homicide offense was unconstitutional because it precludes consideration of the juvenile's chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. While there was no legal support for extending *Miller*'s protections under the Eighth Amendment, *Miller* and *Montgomery* were persuasive to the extent they held that juveniles are constitutionally different from adults for purposes of imposing a life-without-parole sentence, and that general proposition was adopted under the Michigan Constitution. However, United States Supreme Court jurisprudence was not followed to the extent that it drew the line for defining the class of defendants who are entitled to

individualized sentencing to those under the age of 18. To determine where to draw the new line under Michigan's constitutional provision, scientific and social-science research regarding the characteristics of the late-adolescent 18-year-old brain was considered. In the punishment context, science has always informed what constitutes "cruel" or "unusual" punishment in regards to certain classes of defendants. Late adolescence—including the age of 18—is a key stage of development characterized by significant brain, behavioral, and psychological change. The key characteristic of the adolescent brain is exceptional neuroplasticity, which is a critical period of cognitive development for young adults that has significant consequences on their behavior. Late adolescents are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead. Thus, this period of late adolescence is characterized by impulsivity, recklessness, and risk-taking. This period of development also explains why late adolescents are more susceptible to negative outside influences, including peer pressure. Finally, these hallmark features of the developing brain render late adolescents less fixed in their characteristics and more susceptible to change as they age. This evolving understanding of a juvenile's neurological and psychological development is reflected generally in Michigan statutory provisions that treat 18-year-olds differently than other adults.

2. Michigan's Constitution requires that sentencing decisions be proportional. *People v Bullock*, 440 Mich 15 (1992), citing *People v Lorentzen*, 387 Mich 167 (1972), held that courts, in evaluating the proportionality of sentences under the "cruel or unusual punishment" clause, are required to consider (1) the severity of the sentence relative to the gravity of the offense, (2) sentences imposed in the same jurisdiction for other offenses, (3) sentences imposed in other jurisdictions for the same offense, and (4) the goal of rehabilitation, which is a criterion specifically rooted in Michigan's legal traditions. Determining whether the Legislature's chosen sentence runs afoul of the Michigan Constitution's protections is well within the purview of this Court. Under this test, mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment; thus, automatic life without parole for this class of defendants is a disproportionate sentence that constitutes "cruel or unusual punishment" under Const 1963, art 1, § 16. The first factor weighed in favor of finding that the penalty was cruel or unusual. While defendant's crime was serious, the sentence was the most severe sentence available in Michigan, and young persons will inevitably serve more time and

spend a greater percentage of their lives behind prison walls than similarly situated older adult offenders. Moreover, because of the dynamic neurological changes that late adolescents undergo as their brains develop over time and essentially rewire themselves, automatic condemnation to die in prison at 18 was cruel. The logic articulated in *Miller* about why children are different from adults for purposes of sentencing applied in equal force to 18-year-olds. Michigan's sentencing scheme has failed to consider whether any 18-year-old defendants are irreparably corrupt, whether they have the capacity to positively reform as they age, and whether they committed their crime at a time in their life when they lacked the capability to fully understand the consequences of their actions. This was completely contrary to *Bullock*, which held that for a punishment to be constitutionally proportionate, it must be tailored to a defendant's personal responsibility and moral guilt. The second factor also weighed in favor of finding the penalty cruel or unusual. Because 18-year-old offenders will inevitably spend more time behind prison bars than any other adult offenders convicted of the same crime or similarly severe crimes, this penalty was disproportionate to other offenders in Michigan. Moreover 18-year-old offenders will spend more time in prison than most equally culpable juvenile offenders, who are eligible for term-of-years sentences with the possibility of parole at some point in their adult lives under *Miller* and MCL 769.25. The third factor was more neutral than the first two, although it weighed slightly in favor of an individualized sentencing procedure for 18-year-old offenders. Excluding Michigan, 17 states and the federal government mandate life without parole for equivalent first-degree murder. However, 25 states and the District of Columbia do not legislatively mandate life without parole for equivalent first-degree murder, regardless of the age of the offender. The state of Washington, with a similarly broad punishment provision in its constitution, judicially found the neurological differences between juveniles and 18-year-olds to be nonexistent and mandated that young adults through the age of 20 receive the same individualized sentencing protections as juveniles. Likewise, six more states only mandate life without parole for equivalent first-degree murder when there are proven aggravated circumstances. Michigan was thus among the minority of states that legislatively mandate life without parole for every perpetrator of first-degree murder above the age of 17. Finally, the fourth factor, the goal of rehabilitation, which is a specific goal of Michigan's criminal-punishment system, was not accomplished by mandatorily sentencing an individual to life in prison without any hope of release. Accordingly, under the proportionality test,

Michigan's sentencing scheme mandating that 18-year-old defendants convicted of first-degree murder receive a sentence of life imprisonment without the possibility of parole constituted cruel or unusual punishment under Const 1963, art 1, § 16.

3. Parks had to be resentenced given that he was automatically sentenced to spend the rest of his life in prison under MCL 750.316. The sentencing court in this case gave no consideration to any of the attributes of youth that Parks shared with juvenile defendants. The attributes of youth must be considered to ensure that the sentencing of 18-year-old defendants found guilty of first-degree murder passes constitutional muster. Nor was he given the same benefit of an individualized sentencing procedure that exists pursuant to either MCL 769.25a or MCL 769.25 as afforded to juveniles neurologically identical to him.

4. The prosecution's request to revisit *Lorentzen* and *Bullock* was declined because there was no basis for overturning the well-established precedent that the Michigan Constitution provides broader protection to criminal defendants from disproportionate punishments than that offered under the federal Constitution. There is an unambiguous, meaningful textual difference between the federal constitutional provision and Michigan's constitutional provision. The original meaning of a constitutional provision is not easily definable and should not be used to overturn 50 years of precedent.

Part II(B)(4) of the Court of Appeals opinion was reversed, Parks's sentence for first-degree murder was vacated, and the case was remanded to the Genesee Circuit Court for Parks to be resentenced under MCL 769.25. Leave to appeal was denied in all other respects. On remand, the Genesee Circuit Court was directed to redetermine a portion of Parks's restitution order pursuant to the decision of the Court of Appeals.

Justice BERNSTEIN, concurring, agreed with the majority's analysis of the proportionality test outlined in *People v Bullock*, 440 Mich 15 (1992), and with the majority's conclusion that the imposition of mandatory sentences of life imprisonment without the possibility of parole on 18-year-old offenders violates this proportionality principle, but he wrote separately to highlight additional reasons that support this position. The majority's decision shifted more control over difficult sentencing decisions to local actors, which Justice BERNSTEIN believed would only help when making difficult choices on an individualized basis. Additionally, evolving standards of decency have changed enough to both redefine what type of punishment is viewed as cruel and unusual and the breadth of the class afforded protection from

such punishment; accordingly, Justice BERNSTEIN believed that it was problematic to draw a bright line under which age is the only criterion in determining whether a mandatory sentence of life without the possibility of parole is cruel or unusual. He believed that a better approach would be to institute a shifting age-based presumption through which offenders could move to seek additional process based on other, non-age-based qualities of diminished culpability, which could entitle some offenders over the age of 18 to the same protections as youthful offenders.

Justice ZAHRA, joined by Justice VIVIANO, dissenting, joined Justice CLEMENT's dissenting opinion in full and would accept the prosecution's invitation to revisit caselaw interpreting Const 1963, art 1, § 16—specifically whether Article 1, § 16 provides greater protection than the Eighth Amendment of the United States Constitution and whether Article 1, § 16 contains a proportionality guarantee.

Justice CLEMENT, joined by Justices ZAHRA and VIVIANO, dissenting, would not have extended *Miller*'s rule to offenders who were 18 years old at the commission of their crime because imposing mandatory sentences of life without parole on 18-year-old offenders is not unconstitutional under either the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16. When applying the proportionality test, the first factor, the gravity of the offense as opposed to the severity of the punishment, weighed in favor of finding the penalty constitutional. First-degree murder is a very serious offense, arguably the most serious offense one can commit; accordingly, a very severe sentence is proportionate. Moreover, even given young adults' ongoing neurological development, 18-year-olds are generally more than able to comprehend the gravity of the offense of first-degree murder. The second factor, the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, also weighed in favor of finding the penalty constitutional because mandatory life without parole for first-degree murder is not out of place when considered alongside other punishments that also require the imposition of a mandatory sentence of life without parole, including first-degree criminal sexual conduct, adulteration of drugs with intent to kill, and possession with intent to unlawfully use an explosive device causing death, among other offenses. The third factor, the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, weighed in favor of finding the penalty constitutional. Seventeen other states and the federal government also have mandatory sentences of life without parole for 18-year-old offenders, and the existence of one opinion

by a sister state's supreme court did not shed much light on whether the third factor weighed in favor of the penalty's unconstitutionality. Finally, although the fourth factor, whether the penalty imposed advances the penological goal of rehabilitation, does not weigh in favor of the penalty's constitutionality given that a defendant sentenced to mandatory life without parole has little realistic chance for parole, there are other valid penological goals, such as retribution, deterrence, and incapacitation. Accordingly, the first three factors weighed strongly in favor of the punishment's constitutionality, and to the extent that the fourth factor weighed against the punishment's constitutionality, this factor alone was insufficient to support a determination that mandatory sentences of life without parole are unconstitutional. Furthermore, the majority's reliance on neuroscience demonstrated that its decision was based in large part on policy, and policy decisions should be left to the Legislature.

CONSTITUTIONAL LAW — SENTENCING — FIRST-DEGREE MURDER — MANDATORY SENTENCES OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE — 18-YEAR-OLD OFFENDERS.

Const 1963, art 1, § 16 prohibits cruel or unusual punishment and requires that sentencing decisions be proportional; mandatorily subjecting 18-year-old defendants convicted of first-degree murder to a sentence of life imprisonment without the possibility of parole violates the principle of proportionality derived from the Michigan Constitution and thus constitutes unconstitutionally cruel punishment under Const 1963, art 1, § 16; defendants who were 18 years old when they committed first-degree murder are entitled to the full protections of the individualized sentencing procedure under MCL 769.25 and the Court's caselaw, as opposed to the automatic sentencing scheme in MCL 750.316(1).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Angeles R. Meneses*) for defendant.

Amici Curiae:

James M. Brown *in propria persona*.

Robert E. Hawkins *in propria persona*.

Cooley LLP (by *Kathleen Hartnett*, *Darina Shtrakhman*, *Zoë Helstrom*, *Adam Gershenson*, *Robert W. Jacques*, and *Matt Nguyen*) and *Gurewitz & Raben PLC* (by *Harold Gurewitz*) for Leading Developmental Psychologists, Neuroscientists, and Scholars.

WELCH, J. This is the direct appeal of the mandatory life-without-parole sentence imposed on defendant, Kemo Knicombi Parks, for his first-degree premeditated-murder conviction under MCL 750.316(1)(a). Parks was 18 years old when he aided and abetted in the murder. Parks asserts that his sentence is cruel and/or unusual punishment under both the United States and Michigan Constitutions. Under current United States Supreme Court precedent, Parks's Eighth Amendment argument must fail. However, we hold that his sentence of mandatory life without parole violates the Michigan Constitution's ban on "cruel or unusual" punishment. Const 1963, art 1, § 16. Specifically, his sentence lacks proportionality because it fails to take into account the mitigating characteristics of youth, specifically late-adolescent brain development. Therefore, we reverse the portion of the judgment of the Court of Appeals affirming Parks's sentence, vacate Parks's life-without-parole sentence, and remand this case to the Genesee Circuit Court for resentencing proceedings that are consistent with this opinion.

I. BACKGROUND

A. FACTUAL AND PROCEDURAL HISTORY

On October 5, 2016, Parks's older cousin, Dequavion Harris, shot and killed the victim in the parking lot of

a convenience store. According to a witness, prior to the murder, Parks and Harris spoke to each other in low voices and whispers in the back seat of a car parked outside the convenience store. Parks then gave a gun to Harris. Both men entered the store, and Harris exited to the parking lot a short time later. Parks remained inside the store. Thereafter, the victim, who was sitting in his car in the parking lot, was shot and killed. Witnesses heard gunshots and observed Harris flee the parking lot. Parks was 18 years old at the time of the shooting.

At trial, the prosecution's theory was that Harris and Parks planned to kill the victim in retaliation for the prior murder of Harris's cousin. The prosecution never alleged that Parks shot the victim; instead, the prosecution charged Parks with first-degree premeditated murder under an aiding-and-abetting theory. Both Harris and Parks were found guilty of first-degree premeditated murder, MCL 750.316(1)(a); carrying a concealed pistol, MCL 750.227(2); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Both defendants were sentenced to mandatory life without parole for their first-degree-murder convictions, to be served consecutively with the mandatory two-year minimum for felony-firearm.

With the aid of counsel, both defendants appealed in the Court of Appeals, and the Court of Appeals consolidated the cases.[1] In an unpublished per curiam opin-

[1] *People v Harris*, unpublished order of the Court of Appeals, entered March 31, 2020 (Docket Nos. 346586 and 346587). Parks moved to remand the case to the trial court for an evidentiary hearing regarding the issues he raised on appeal, and the Court of Appeals denied the motion. *People v Parks*, unpublished order of the Court of Appeals, entered August 30, 2019 (Docket No. 346587).

ion, the Court of Appeals affirmed Harris's and Parks's convictions and sentences, with the exception of ordering a limited remand in Parks's appeal to redetermine a portion of Parks's restitution order. *People v Harris*, unpublished per curiam opinion of the Court of Appeals, issued August 13, 2020 (Docket Nos. 346586 and 346587), p 14. The Court of Appeals specifically rejected Parks's challenge to his sentence as cruel and unusual punishment under the federal and state Constitutions. *Id*. at 11-12.

Parks sought leave to appeal in this Court, and we ordered additional briefing to address

> whether the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016), should be applied to defendants who are over 17 years old at the time they commit a crime and who are convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both.[2]

B. THE EIGHTH AMENDMENT DICTATES THAT YOUTH MATTERS IN SENTENCING

The Eighth Amendment of the United States Constitution reads in full: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." US Const, Am VIII (emphasis added). "[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated

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[2] *People v Parks*, 508 Mich 940, 940 (2021). We also scheduled oral argument in *People v Poole* (Docket No. 161529) at the same session. *Id*. We have remanded *Poole* to the Court of Appeals for consideration of defendant Poole's case in light of this opinion. *People v Poole*, 510 Mich 851, 852 (2022).

and proportioned to the offense." *Roper v Simmons*, 543 US 551, 560; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (quotation marks, citation, and brackets omitted). To that end, the United States Supreme Court has stated that to determine if a punishment is disproportionate, courts must look to the "evolving standards of decency that mark the progress of a maturing society . . . ." *Id*. at 561 (quotation marks and citation omitted). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Id*. at 560. "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Graham v Florida*, 560 US 48, 59; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

The Supreme Court has long recognized that children are constitutionally different from adults for sentencing purposes. See *Miller v Alabama*, 567 US 460, 471; 132 S Ct 2455; 183 L Ed 2d 407 (2012). Overall, juveniles have diminished culpability and greater prospects for reform, thereby making them "less deserving of the most severe punishments." *Id*. (quotation marks and citation omitted). "Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Roper*, 543 US at 569 (quotation marks, citation, and brackets omitted).

The United States Supreme Court has succinctly summarized the three significant differences between juveniles and adults. "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 US at 471 (quotation marks and citation omitted). "Second, children 'are more vulnerable . . . to negative influences and outside pres-

sures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Id*. (citation omitted; alteration in original). "And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' " *Id*. (citation omitted; alterations in original). "Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.' " *Id*. at 472-473 (quotation marks and citation omitted). This basic overall principle—that youthful characteristics render defendants less culpable—has shaped Eighth Amendment jurisprudence for the last two decades.

In 2005, the United States Supreme Court first recognized that children are different from adults for sentencing purposes when it abolished the death penalty for minors in *Roper*, 543 US at 578-579. In doing so, it determined that the differences between juvenile and adult defendants "are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id*. at 572-573. As the death penalty is reserved for only the worst offenders, this group could not include juveniles.[3] See *id*. at 569. In making this bright-line prohi-

[3] As further support for its holding in *Roper*, the Court also noted:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of

bition of the death penalty for those under 18 years old, the Court explained why it drew the line at 18:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18*. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest. [*Id*. at 574 (emphasis added).]

Five years later, in *Graham*, 560 US at 74, the Court concluded that "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders," and thus the penalty was deemed cruel and unusual under the Eighth Amendment. "This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Id*. Thus, defendants in this situation should be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 75. Notably, in its holding the Court cited *Roper*'s reasoning about why it drew the line between adulthood and childhood at age 18, concluding that the same line applied to the categorical ban of life-without-parole sentences for nonhomicide offenses. *Id*. at 74-75.[4]

> the Eighth Amendment's prohibition of cruel and unusual punishments. [*Roper*, 543 US at 575 (quotation marks and citation omitted).]

[4] Again, like in *Roper*, as justification for its holding, the Supreme Court noted that at the time only 11 nations authorized life without parole for juvenile offenders under any circumstances and that the

In *Miller*, 567 US at 477, the United States Supreme Court held that mandatory life without parole for a juvenile convicted of a homicide offense was unconstitutional because it "precludes consideration of [the juvenile's] chronological age and its hallmark features —among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller* therefore established a constitutional rule that requires that sentencing courts consider the unique characteristics of youth. To do so, the Court established factors that a sentencing court must consider, and these factors have become known as the "*Miller* factors." These include: (1) chronological age and immaturity, impetuosity, and the failure to appreciate risks and consequences; (2) the offender's family and home environment; (3) circumstances of the offense, including the extent of participation in the criminal conduct and the effect of familial and peer pressures; (4) the effect of the offender's youth on the criminal-justice process, such as the offender's inability to comprehend a plea bargain; and (5) the possibility of rehabilitation. *Id*. at 477-478. These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*. at 472. The Court concluded:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U.S., at 75, 130 S.Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too

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United States was one of only two nations that ever imposed the punishment in practice. *Graham*, 560 US at 80-81.

> great a risk of disproportionate punishment. . . . But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. *That is especially so because of the great difficulty we noted in* Roper *and* Graham *of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption*." *Roper*, 543 U.S., at 573, 125 S.Ct. 1183; *Graham*, 560 U.S., at 68, 130 S.Ct., at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [*Miller*, 567 US at 479-480 (emphasis added).]

Following *Miller*, the United States Supreme Court was presented with the question whether *Miller*'s ban on mandatory sentencing schemes applies retroactively. *Montgomery v Louisiana*, 577 US 190, 193-194; 136 S Ct 718; 193 L Ed 2d 599 (2016). In *Montgomery*, the Court clarified:

> Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile *offenders whose crimes reflect the transient immaturity of youth*. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him. [*Montgomery*, 577 US at 208-209 (quotation marks, citations, and brackets omitted; emphasis added).]

The Court reiterated that "[a]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect ' "irreparable corruption." ' " *Id*. at 195, quoting *Miller*, 567 US at 479, in turn quoting *Roper*, 543 US at 573. Ultimately, *Montgomery* clarified that *Miller* "required that sentencing courts consider a child's diminished culpability and heightened capacity for change before condemning him or her to die in prison." *Montgomery*, 577 US at 195 (quotation marks and citation omitted).

Most recently, in *Jones v Mississippi*, 593 US ___, ___; 141 S Ct 1307, 1317; 209 L Ed 2d 390 (2021), the Supreme Court held that "*Miller* required a discretionary sentencing procedure." The Court explained: "The key assumption of both *Miller* and *Montgomery* was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Id*. at ___; 141 S Ct at 1318.

Post-*Miller*, and in anticipation of *Montgomery*, Michigan's Legislature established juvenile resentencing procedures that are consistent with these cases. MCL 769.25a; MCL 769.25. The statutes require the court to sentence a defendant to at least a 60-year maximum term and a minimum term of not less than 25 years or more than 40 years, unless the prosecuting attorney files a motion seeking a sentence of life without parole. MCL 769.25a(4)(b) and (c); MCL 769.25(3) and (9). If the prosecutor seeks a sentence of life without parole, the trial court must conduct a hearing and consider the *Miller* factors, any other

relevant criteria, and the defendant's record while incarcerated. MCL 769.25a(4)(b); MCL 769.25(6). In *People v Taylor*, 510 Mich 112, 119-120, 138-139; 987 NW2d 132 (2022), we held that the combination of *Miller* and MCL 769.25 creates a rebuttable presumption against life-without-parole sentences for juvenile offenders and that the prosecution, as the moving party, must overcome this presumption by clear and convincing evidence.

C. THE MICHIGAN CONSTITUTION FORBIDS EXCESSIVE IMPRISONMENT

Michigan's Constitution has its own punishment provision, but it is broader than the federal Eighth Amendment counterpart. The provision reads in full: "Excessive bail shall not be required; excessive fines shall not be imposed; *cruel or unusual punishment* shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1, § 16 (emphasis added). We have held that unusually excessive imprisonment is forbidden by Article 1, § 16 of the Michigan Constitution. *People v Lorentzen*, 387 Mich 167, 170 n 1, 172; 194 NW2d 827 (1972) (invalidating a mandatory minimum prison sentence of 20 years for selling any amount of marijuana). We further stated that this standard is informed by "evolving standards of decency that mark the progress of a maturing society." *Id*. at 179 (quotation marks and citation omitted). The definition of this standard is "progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id*. at 178 (quotation marks and citation omitted).

Further, we have held that our Constitution requires that sentencing decisions be proportional. Our seminal opinion on the principle of proportionality is

People v Bullock, 440 Mich 15; 485 NW2d 866 (1992). In that case, we held that a life-without-parole sentence for possession of 650 grams or more of a mixture containing cocaine was unconstitutional under the state Constitution because of a lack of proportionality. *Id*. at 27, 30. We set forth three compelling reasons that the state Constitution's ban on "cruel or unusual" punishment offers broader protection than its federal counterpart. *Id*. at 30. First, there are textual differences between the state and federal Constitutions; a bar on punishments that are either cruel *or* unusual is necessarily broader than a bar on punishments that are both cruel *and* unusual. *Id*. at 30 n 11. Second, by 1963, the words "cruel" and "unusual" had been understood "for more than half a century to include a prohibition on grossly disproportionate sentences," indicating that the framers and adopters of the 1963 Constitution had intended a broader view of the state constitutional protection. *Id*. at 32. Lastly, we recognized that there is longstanding Michigan precedent to support this broader view of Michigan's constitutional provision. *Id*. at 33.

In particular, we noted that Michigan courts, in evaluating the proportionality of sentences under the "cruel or unusual punishment" clause, are required to consider: (1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically "rooted in Michigan's legal traditions . . . ." *Id*. at 33-34, citing *Lorentzen*, 387 Mich at 176-181. The Court in *Bullock* concluded that the *Lorentzen* analysis was "firmly and sufficiently rooted in Const 1963, art 1, § 16." *Bullock*, 440 Mich at 34. We thus held that the punishment at

issue in *Bullock* was unconstitutional because it failed the *Lorentzen* balancing test, then added:

> The proportionality principle inherent in Const 1963, art 1, § 16, is not a simple, "bright-line" test, and *the application of that test may, concededly, be analytically difficult and politically unpopular, especially where application of that principle requires us to override a democratically expressed judgment of the Legislature*. The fact is, however, the people of Michigan, speaking through their constitution, have forbidden the imposition of cruel or unusual punishments, and we are duty-bound to devise a principled test by which to enforce that prohibition, and to apply that test to the cases that are brought before us. The very purpose of a constitution is to subject the passing judgments of temporary legislative or political majorities to the deeper, more profound judgment of the people reflected in the constitution, the enforcement of which is entrusted to our judgment. [*Id*. at 40-41 (emphasis added).]

Therefore, in addition to those protections guaranteed to every citizen of this country under the Eighth Amendment of the federal Constitution, our state Constitution has historically afforded greater bulwarks against barbaric and inhumane punishments. It is through this heightened protective standard that we must consider the issue before us today.[5]

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[5] We decline the prosecution's request to revisit *Lorentzen* and *Bullock*, because we see no basis for overturning the well-established precedent that our Constitution provides broader protection to criminal defendants from disproportionate punishments than that offered under the federal Constitution. See *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010) ("Indeed, this Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so."). Moreover, Chief Justice Roberts's dissent in *Miller* indicates that the words "cruel and unusual" are meant to be read together in Eighth Amendment jurisprudence; thus, it remains logical to us that the Michigan Constitution's choice of the word "or" deliberately and meaningfully provides broader protection to criminal defendants. See *Miller*,

II. ANALYSIS

After reviewing the arguments of the parties as well as the amici, we are left with the inescapable conclusion that mandatorily condemning 18-year-olds to die in prison, without consideration of the attributes of youth that 18-year-olds and juveniles share, no longer comports with the "evolving standards of decency that mark the progress of a maturing society." *Lorentzen*, 387 Mich at 179 (quotation marks and citation omitted). Therefore, we conclude that the Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like other older adults.

We acknowledge that some of the mitigating characteristics in the scientific research submitted by amici and defense counsel apply to young adults, in some form, up to the age of 25. We also do not dispute the

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567 US at 493 (Roberts, C.J., dissenting) ("Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such."). Additionally, the original meaning of a constitutional provision is not easily definable and should not be used to overturn 50 years of precedent. See *People v Stovall*, 510 Mich 301, 331; 987 NW2d 85 (2022) (MCCORMACK, C.J., concurring). This is particularly true when there is an unambiguous, meaningful textual difference between the federal constitutional provision and our own. See *People v Collins*, 438 Mich 8, 32; 475 NW2d 684 (1991) (explaining that a compelling reason for "independent state construction" of a constitutional provision "might be found if there were significant textual differences between parallel provisions of the state and federal constitutions" in addition to if history provides a reason to believe a different interpretation is warranted). Given this long-established understanding that our Constitution offers broader protection than the federal Constitution, we decline the invitation to revisit the precedent that supports this broader interpretation.

dissent's point that any line-drawing will, at times, lead to arbitrary results. The United States Supreme Court grappled with this same issue in *Roper*, 543 US at 574, noting, "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules." While line-drawing is difficult, our Constitution compels us to make these difficult decisions. Given that Parks and Poole (the defendant in the companion case) were both 18 at the time they committed their crimes, our opinion only applies to 18-year-olds. We need not address the Michigan constitutional requirements for sentencing offenders who were over 18 years old at the time of the offense.

A. STANDARD OF REVIEW

We review questions of constitutional law de novo. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018). Moreover, we alone are "the ultimate authority with regard to the meaning and application of Michigan law." *Bullock*, 440 Mich at 27.

B. THE FEDERAL COURTS HAVE DRAWN A CLEAR LINE BETWEEN JUVENILES AND ADULTS FOR SENTENCING PURPOSES UNDER THE EIGHTH AMENDMENT

The parties in this case were asked to address whether the United States and/or Michigan Constitutions protect 18-year-olds from receiving a mandatory sentence of life without parole. Under current federal precedent, the Eighth Amendment of the United States Constitution does not prohibit such sentences.

The United States Supreme Court has, for the better part of this century, reshaped how juveniles convicted of first-degree murder must be sentenced in this country. Undoubtedly, condemning children to die in the custody of the state, either through execution or be-

hind prison walls, without any specialized consideration of their brain's neuroplasticity and the attendant characteristic of their capacity for rehabilitation, has been deemed barbaric under the proportionality principle of the Eighth Amendment. For those who commit the most heinous of crimes, the Supreme Court has indicated a clear, even if arguably arbitrary, demarcation between adult sentencing and juvenile sentencing. While this holding relies on the brain science that applies equally to juveniles and early adolescents—which includes 18-year-olds—we cannot contradict the Supreme Court if it has drawn a clear and unambiguous line under the United States Constitution between those under the age of 18 and those aged 18 and older.

The Court has indeed drawn that line. In 2005, the Court noted in *Roper* that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18" but that it must draw the line where society has traditionally marked the transition from childhood to adulthood. *Roper*, 543 US at 574. Likewise, *Graham* drew a bright line at 18 when categorically prohibiting juvenile life without parole for nonhomicide offenses, citing the same logic from *Roper*. *Graham*, 560 US at 74-75. The subsequent decisions of *Miller*, *Montgomery*, and *Jones* did not question or reform the bright line drawn in *Roper*.[6]

[6] Additionally, multiple federal circuit courts of appeal have declined challenges similar to those raised by Parks. See, e.g., *United States v Sierra*, 933 F3d 95, 97 (CA 2, 2019) ("Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, . . . the defendants' age-based Eighth Amendment challenges to their sentences must fail."), cert denied sub nom *Beltran v United States*, ___ US ___; 140 S Ct 2540 (2020); *Wright v United States*, 902 F3d 868, 872 (CA 8, 2018) ("[The defendant] was sentenced for conspiratorial conduct that extended well into his adult

Therefore, in light of current federal precedent, we find no support in the Eighth Amendment for extending *Miller*'s protections under the Eighth Amendment beyond the bright line originally set in *Roper*. But the fact that the United States Supreme Court has decided to draw the line at 17 does not preclude us from drawing a different line pursuant to the broader protections provided by the Michigan Constitution. It is only logical that Michigan's "cruel *or* unusual" language is broader than the Eighth Amendment floor. And the Supreme Court, in fact, recently indicated that states have a wide latitude in providing greater *Miller* protections. See *Jones*, 593 US at ___; 141 S Ct at 1323 ("Importantly, like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits . . . . States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences.").

In other words, we may draw our own line, and we do so today.

C. THE 18-YEAR-OLD BRAIN

Although we are not bound by the United States Supreme Court's interpretation of the Eighth Amendment when interpreting our constitutional prohibition on cruel or unusual punishment, we find *Miller* and *Montgomery* persuasive to the extent they held that juveniles are constitutionally different from adults for purposes of imposing a life-without-parole sentence and, for the reasons stated in this opinion, adopt that general proposition under the Michigan Constitution. However, we part ways with the United States Su-

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years . . . . Thus, the procedural element of the new substantive rule of constitutional law made retroactive in *Montgomery* does not apply . . . .").

preme Court's jurisprudence to the extent the Court drew the line for defining the class of defendants that are entitled to individualized sentencing to those under the age of 18.

In order to determine where to draw that new line, we must consider the scientific and social-science research regarding the characteristics of the late-adolescent 18-year-old brain. By doing so, we take our cue from the United States Supreme Court, which has consistently noted the scientific justifications for its holdings regarding juvenile punishments. See, e.g., *Roper*, 543 US at 569-574; *Graham*, 560 US at 67-69; *Miller*, 567 US at 471-479. The dissent casts no criticism on the United States Supreme Court's decision to draw its bright line in *Miller* based on the neurological characteristics of juveniles as a class. *Miller*, 567 US at 471-479. Our consideration of brain science to determine whether the Legislature's chosen sentence—mandatory life without parole—is cruel or unusual to impose on 18-year-olds who commit first-degree-murder is no different than the analysis the United States Supreme Court undertook a decade ago in *Miller*.

Such judicial determinations and considerations are not an exercise of an inappropriate policy-making function but a requirement under our Constitution. Appellate courts, including our Court, often use science to determine evidentiary issues in criminal cases.[7] And, most importantly, in the punishment context, science has always informed what constitutes "cruel" or "unusual" punishment in regards to certain classes

[7] See *People v Feezel*, 486 Mich 184, 207-212; 783 NW2d 67 (2010) (holding that 11-carboxy-THC is not a controlled substance, in part, because it is a metabolite that is created when a person's body breaks down THC).

of defendants. See, e.g., *Roper*, 543 US at 569-574 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults."); *Atkins v Virginia*, 536 US 304, 317-321; 122 S Ct 2242; 153 L Ed 2d 335 (2002) (analyzing the neurological characteristics of intellectually disabled defendants in determining that they have lessened criminal culpability; therefore, the deterrent and retributive purpose of the death penalty was not achieved and execution was not a "suitable punishment" for this class of defendants). In short, while the dissent claims that we have embarked upon an inappropriate judicial "foray into neuroscience" or that we are "playing amateur scientists," it is our role to consider objective, undisputed scientific evidence when determining whether a punishment is unconstitutional as to a certain class of defendants. Our role is no different than that of the United States Supreme Court and its own historical approach to Eighth Amendment jurisprudence.[8]

Based on the submissions from defense counsel and the neuropsychologist, psychologist, and criminal-justice scholar amici, there is a clear consensus that late adolescence—which includes the age of 18—is a key stage of development characterized by significant brain, behavioral, and psychological change. This period of late adolescence is a pivotal developmental stage that shares key hallmarks of adolescence. This consensus arises out of a multitude of reliable studies on adolescent brain and behavioral development in the years following *Roper*, *Graham*, *Miller*, and *Montgomery*. And the inherent malleability and plasticity of

[8] Moreover, our decision today is not solely based on science but on other factors relevant to the proportionality test.

late-adolescent brains are features that are similar to those that the *Miller* Court found relevant to its culpability analysis, which, in turn, formed the basis of *Miller*'s prohibition on mandatory life-without-parole sentences for adolescent defendants.

The key characteristic of the adolescent brain is exceptional neuroplasticity. See Aoki, Romeo, & Smith, *Adolescence as a Critical Period for Developmental Plasticity*, 1654 Brain Res 85 (2017). Because of multiple ongoing processes that relate to development of the brain, during which the brain essentially rewires itself, young adolescents undergo a period during which they are still developing cognitively. See, e.g., Selemon, *A Role for Synaptic Plasticity in the Adolescent Development of Executive Function*, 3 Translational Psychiatry 1 (2013); Spear, *Adolescent Neurodevelopment*, 52 J Adolescent Health 7 (2013). This crucial period of cognitive development has significant consequences for young adults' behavior.

First, the research indicates that late adolescents are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead. See National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing Opportunity for All Youth* (Washington, DC: The National Academies Press, 2019), pp 37, 51-52. Thus, this period of late adolescence is characterized by impulsivity, recklessness, and risk-taking, as evidenced by the heightened incidents of drunk driving, unintended pregnancies, binge drinking, and arrests during this period. See Willoughby et al, *Examining the Link Between Adolescent Brain Development and Risk Taking from a Social-Developmental Perspective*, 83 Brain & Cognition 315, 315-320 (2013). This process of brain rewiring means

that young adults have yet to reach full social and emotional maturity, given that the prefrontal cortex—the last region of the brain to develop, and the region responsible for risk-weighing and understanding consequences—is not fully developed until age 25. See, e.g., *The Promise of Adolescence: Realizing Opportunity for All Youth*, p 51; Arain et al, *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 449-450, 453-454 (2013).

Secondly, this period of development also explains why a young adult is more susceptible to negative outside influences, including peer pressure. See Gardner & Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Dev Psychol 625, 629-634 (2005). This susceptibility to peer pressure exacerbates late adolescents' predisposition to risk-taking and deficiencies in decision-making. See *id*. In the presence of peers, young adults are more sensitive to the potential rewards as opposed to the potential consequences or costs of a decision. See O'Brien et al, *Adolescents Prefer More Immediate Rewards When in the Presence of their Peers*, 21 J Res on Adolescence 747, 747-753 (2011). This results in a late adolescent often behaving more similarly to a 14- or 15-year-old, as opposed to an older adult, when in the presence of their peers. See *id*. Furthermore, 18-year-olds are acutely sensitive to the potential of social rejection, which increases conformity with their peers. See Blakemore, *The Social Brain in Adolescence*, 9 Nature Reviews Neuroscience 267, 269 (2008).

Lastly, these hallmarks of the developing brain render late adolescents less fixed in their characteristics and more susceptible to change as they age. Late adolescents, as they age, continue to formulate their

identities, become more assertive and decisive, show increases in self-control and the ability to resist outside influence, become more reflective and deliberate, and demonstrate a decrease in aggressiveness and alienation. See, e.g., *Adolescence as a Critical Period for Developmental Plasticity*, 1654 Brain Res at 85; Tanner & Arnett, *The Emergence of "Emerging Adulthood": The New Life Stage Between Adolescence and Young Adulthood*, in *Handbook of Youth and Young Adulthood: New Perspectives and Agendas* (New York: Routledge, 2009), pp 39-42.

Overall, late-adolescent brains are far more similar to juvenile brains, as described in *Miller*, 567 US at 471-479, than to the brains of fully matured adults. Notably, the prosecution does not even attempt to refute the scientific consensus that, in terms of neurological development, there is no meaningful distinction between those who are 17 years old and those who are 18 years old. The ongoing neurodevelopment described in scientific and medical literature, characterized by neuroplasticity and its attendant characteristics, blurs the already thin societal line between childhood and young adulthood.

This evolving understanding of a juvenile's neurological and psychological development is reflected generally in Michigan statutory provisions governing young adults. In Michigan, when an individual attains the age of 18, their ability to partake in certain activities is still heavily regulated. Despite obtaining access to some rights and privileges, 18-year-olds still may not purchase, consume, or possess alcohol, MCL 436.1109(6) and MCL 436.1703(1); purchase or possess cannabis for adult use under state law, MCL 333.27954(1) and MCL 333.27955; open a credit card without a cosigner, 15 USC 1637(c)(8); or obtain a

concealed-carry permit for a pistol, MCL 28.425b(7)(a). Additionally, Michigan has long recognized the differences in late-adolescent brain development, as evidenced by the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*. HYTA was passed in 1966 and originally covered youths between the ages of 17 and 24, allowing these late adolescents to be assigned "youthful trainee" status and to be placed on probation if they plead guilty to a criminal offense. In 2021, the qualifying age for HYTA sentencing was raised to late adolescents between the ages of 18 and 26. 2020 PA 396. Both federal and state laws suggest that our society has judged 18-year-olds as not sufficiently mature to engage in certain risky and potentially dangerous activities; these laws recognize that 18-year-olds make decisions differently. They have therefore been provided different sentencing pathways than their adult counterparts. This societal recognition is highly relevant to determining whether mandatory life without parole is unconstitutional as applied to 18-year-old offenders. See *Lorentzen*, 387 Mich at 179.

The Washington Supreme Court has also recognized this evolving scientific and social consensus. In 2021, that court determined that modern social-scientific evidence regarding the development of the human brain, as well as its own precedent and "a long history of arbitrary line drawing," demonstrated no clear line between childhood and adulthood. See *In re Monschke*, 197 Wash 2d 305, 306-307; 482 P3d 276 (2021). Washington's constitution prohibits "cruel punishment." Wash Const 1889, art 1, § 14. The Washington Supreme Court has held that its constitution affords heightened protection beyond that offered by the Eighth Amendment of the United States Constitution. Accordingly, the Washington Supreme Court determined that with regard to mandatory life-without-

parole sentences, *Miller*'s constitutional guarantee of an individualized sentence (including its required consideration of the mitigating qualities of youth) applies to defendants over the age of 18. Notably, in analyzing the scientific evidence, the Washington Supreme Court concluded:

> [*N*]*o meaningful neurological bright line exists between age 17 and age 18* . . . . Thus, sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in *Miller* . . .—into account for defendants younger and older than 18. Not every 19- and 20-year-old will exhibit these mitigating characteristics, just as not every 17-year-old will. We leave it up to sentencing courts to determine which individual defendants merit leniency for these characteristics. Our aggravated murder statute's requirement of [life without parole] for *all* defendants 18 and older, regardless of individual characteristics, violates the state constitution. [*In re Monschke*, 197 Wash 2d at 326 (first emphasis added).]

These principles are all helpful as we determine the constitutionality under Const 1963, art 1, § 16 of mandatory life-without-parole sentences for 18-year-olds convicted of first-degree murder.

D. PROPORTIONALITY UNDER THE MICHIGAN CONSTITUTION

In order to determine whether our Constitution compels additional considerations when sentencing 18-year-old defendants convicted of first-degree murder to mandatory life without parole, we apply the *Lorentzen* test, as reaffirmed in *Bullock*. The *Lorentzen* test is used to determine whether a punishment is disproportionate and thus "cruel or unusual." We reiterate that this four-factor test requires us to consider: (1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same juris-

diction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically "rooted in Michigan's legal traditions . . . ." *Bullock*, 440 Mich at 33-34.

We hold that this test, overall, compels the conclusion that mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes "cruel or unusual punishment" under Const 1963, art 1, § 16. While the Legislature has authorized such sentences, we are duty-bound to enforce the state Constitution through application of the *Lorentzen* test to reflect "the deeper, more profound judgment of the people reflected in the constitution . . . ." *Bullock*, 440 Mich at 40-41. That judgment compels an individualized sentencing process before condemning 18-year-olds to die behind prison walls.[9]

While the dissent believes that the punishment rendered in this case is a statutory decision that is only within the purview of the Legislature, we note that the interpretation of Const 1963, art 1, § 16 governs our decision. We are duty-bound to interpret the Constitution, no matter the outcome. Contrary to what the

[9] We recognize that this Court has previously held that a mandatory life-without-parole sentence for felony murder did not violate Const 1963, art 1, § 16. See *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976). However, that decision did not address the issue of sentencing a *juvenile* to life without parole. Moreover, *Hall* was decided before the United States Supreme Court decided *Miller* and its progeny, and the *Hall* Court did not have the benefit of the scientific literature cited in this opinion. Accordingly, that decision does not preclude our holding in this case. Moreover, our holding today does not foreclose future review of life-without-parole sentences for other classes of defendants; however, our opinion today does not affect *Hall*'s holding as to those older than 18. See *Hall*, 396 Mich at 657-658.

dissent argues, determining whether the Legislature's chosen sentence runs afoul of our Constitution's protections is well within the purview of this Court and does not violate any separation-of-power principles. We cannot shirk our duty and defer to the Legislature's choice of punishment when its choice is offensive to our Constitution. See *Bullock*, 440 Mich at 41 ("The very purpose of a constitution is to subject the passing judgments of temporary legislative or political majorities to the deeper, more profound judgment of the people reflected in the [C]onstitution, the enforcement of which is entrusted to our judgment.").

1. THE SEVERITY OF THE SENTENCE; THE GRAVITY OF THE OFFENSE

Parks's current fate is to die in prison because of his conviction for first-degree-premeditated murder, MCL 750.316(1)(a), based on a theory of aiding and abetting his cousin, Harris. There can be no dispute that any form of murder is one of the most severe and heinous crimes that a person can commit in any jurisdiction, and first-degree murder is particularly heinous. See *People v Stovall*, 510 Mich 301, 316-317; 987 NW2d 85 (2022) (quoting *People v Carp*, 496 Mich 440, 514; 852 NW2d 801 (2014), cert gtd and opinion vacated sub nom on other grounds *Carp v Michigan*, 577 US 1186 (2016), for the proposition that first-degree murder is " 'almost certainly the gravest and most serious offense that an individual can commit under the laws of Michigan' "). While Parks was not the principal actor in this particular murder, there can be no dispute that the crime of which he was convicted was grave and heinous. A long prison term was indeed warranted. However, our inquiry does not end there, because the proportionality analysis we are required to follow applies equally to

those who commit severe crimes and to those who commit lesser offenses. See *Bullock*, 440 Mich at 40-41.

Just as there can be no dispute that Parks's crime was serious, there can also be no dispute that his sentence is severe. Mandatory life without parole is the *most* severe sentence available in Michigan.[10] Indeed, other than the death penalty, it is the most severe sentence still available in the whole country. As the United States Supreme Court has noted, life without parole " 'share[s] some characteristics with death sentences' " because unlike any other sentence, imprisonment without hope of release for the whole of a person's natural life is " 'a forfeiture that is irrevocable.' " *Miller*, 567 US at 474-475, quoting *Graham*, 560 US at 69. This fate is particularly acute for young persons like Parks, because they will inevitably serve more time and spend a greater percentage of their lives behind prison walls than similarly situated older adult offenders. Contrary to the dissent's assertion, the length of time an offender will spend in prison is undoubtedly a relevant consideration in determining the constitutionality of mandatory life-without-parole sentences. See *Miller*, 567 US at 475, quoting *Graham*, 560 US at 70 (noting that life without parole "is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.' The penalty when imposed on a teenager, as

[10] Michigan was the first state in the nation to abolish the death penalty; it was abolished a decade after the state was admitted to the Union. The last execution to take place under Michigan law was in 1830. State Bar of Michigan, *Michigan Legal Milestones: 41. First to Abolish the Death Penalty* <https://www.michbar.org/programs/milestone/milestones_firsttoabolish> (accessed June 28, 2022) [https://perma.cc/NG5K-LW6L].

compared with an older person, is therefore 'the same in name only' ") (citation and ellipsis omitted).[11]

And, beyond the condemnation to spend nearly the entirety of one's adulthood behind bars, the unique characteristics of 18-year-old brains make this penalty even more severe. Because of the dynamic neurological changes that late adolescents undergo as their brains develop over time and essentially rewire themselves, automatic condemnation to die in prison at 18 is beyond severity—it is cruelty. The brains of 18-year-olds, just like those of their juvenile counterparts, transform as they age, allowing them to reform into persons who are more likely to be capable of making more thoughtful and rational decisions. This means that 18-year-olds, as they age, are likely to begin to take fewer risks, further understand consequences, become less susceptible to peer pressure, and have decreased aggressive tendencies. All of this suggests that 18-year-olds, much like their juvenile counterparts, are generally capable of significant change and a turn toward rational behavior that conforms to societal expectations as their cognitive abilities develop further.

Most importantly, the same features that characterize the late-adolescent brain also diminish the culpability of these youthful offenders, rendering them less

[11] We also find the unpublished Court of Appeals decisions relied on by the dissent, which rejected the argument that term-of-years sentences are equivalent to life sentences for older defendants, are inapposite to the question we are faced with today. Unlike those cases, our decision today deals with a class of late-adolescent defendants who are faced with a prison sentence to be served for the remainder of their biological lives, with no possible hope of release. For the myriad of reasons stated in this opinion, this is an entirely different inquiry than challenges brought by much older adults who are faced with term-of-years sentences.

culpable than older adults. Eighteen-year-olds are at the peak of their risk for criminality because of the neuroplasticity of their brains, causing a general deficiency in the ability to comprehend the full scope of their decisions as compared with older adults.[12] Put differently, the logic articulated in *Miller* about why children are different from adults for purposes of sentencing applies in equal force to 18-year-olds. *Miller*, 567 US at 471-479.

Despite all this, the current sentencing structure mandatorily condemns *all* 18-year-olds who are convicted of certain crimes to life in prison without considering whether they are capable of positive change and without any consideration of their lessened culpability, both of which are undeniable neurobiological facts. In other words, our current sentencing scheme fails to consider whether any 18-year-old defendants are irreparably corrupt, whether they have the capacity to positively reform as they age, and whether they committed their crime at a time in their life when they lacked the capability to fully understand the consequences of their actions. This is completely contrary to *Bullock*, which held that for a punishment to be "constitutionally proportionate" it "must be tailored to a defendant's personal responsibility and moral guilt." *Bullock*, 440 Mich at 39 (quotation marks and citation omitted). "While we emphatically do not minimize the gravity and reprehensibility of defendants' crime, it would be profoundly unfair to impute full personal responsibility and moral guilt" to those who are likely to be biologically incapable of full culpability. *Id*. Such

[12] We do not dispute the dissent's general point that 18-year-olds are capable of comprehending the consequences of their actions in the abstract. However, the science informs us that adolescents also are often negatively influenced by peers and lack impulse control.

an automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel.

2. SENTENCES IMPOSED IN MICHIGAN FOR OTHER OFFENSES

The second *Lorentzen* proportionality factor also weighs in favor of finding that mandatory life without parole is cruel or unusual. Life without parole is the harshest available punishment in Michigan and is seldom mandatorily imposed. It stands to reason that such a harsh sentence should be reserved for those whose criminal culpability mandates automatic, permanent removal from society. Michigan's sentencing scheme generally reflects this. Nonjuvenile individuals are subject to life without parole when they commit first-degree murder, commit severely violent or highly dangerous offenses, or habitually sexually assault children. MCL 791.234(6); MCL 750.316. These crimes all reflect a high degree of moral guilt. See *Bullock*, 440 Mich at 39.

However, because life without parole is necessarily cabined to biological life, not all these sentences are, in practice, reflective of culpability equally. Having been charged and convicted for a crime committed when he was 18 years old, it is highly probable that Parks will spend more time behind prison bars than any other adult defendants convicted of the same crime or similarly severe crimes. See *Miller*, 567 US at 474-475. This is disproportionate to other offenders in this state. For example, Parks, at 18 years old, aided and abetted his cousin in committing this murder[13] and thus was

[13] We do not dispute the dissent's general point that aiders and abettors are equally liable for the same crime as the principal actor under MCL 767.39. However, a defendant's status as an aider and abettor is undoubtedly relevant in the punishment context. Indeed, the

mandatorily subjected to the harshest and severest penalty available in this state. If Parks lives to be 70, he will have served an approximately 52-year prison sentence. Another first-degree murderer, at age 50, who undertakes a multiple-day crime spree involving numerous robberies and murders would also mandatorily receive the harshest and severest penalty available—life without parole. However, if that hypothetical defendant lived to be the same age as Parks, he would have only served an approximately 20-year prison sentence. Considering that Parks's offense could be reflective of his diminished capacity as a late adolescent and that the hypothetical defendant's crime spree would have occurred long after his cognitive abilities had fully matured, the disproportionality is apparent. It is cruel that our current sentencing scheme requires 18-year-old defendants to, on average, serve far more severe penalties than equally or more culpable older adult defendants.

Moreover, Parks will spend more time in prison than most of his equally culpable juvenile offenders. Post-*Montgomery*, every juvenile first-degree murderer in this state has the opportunity for a specialized *Miller* sentencing hearing, at which the prosecution must demonstrate that the juvenile offender should be sentenced to life without parole and the sentencing court must agree; otherwise, the juvenile offender will receive a term-of-years sentence. MCL 769.25. Those juvenile offenders who are a matter of days younger than Parks are eligible to receive a term-of-years

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United States Supreme Court in *Miller* noted that a juvenile's status as an aider and abettor was relevant to determining relative culpability for purposes of sentencing. *Miller*, 567 US at 478 (noting that the defendant at issue "did not fire the bullet that killed" the victim but was instead convicted on an aiding-and-abetting theory, which was a circumstance considered when analyzing the defendant's "culpability for the offense").

sentence—despite the two offenders' identical neuroplasticity—that will make the juvenile offenders eligible for parole at some point in their adult lives. It is cruel punishment to mandatorily impose a life-without-parole sentence on an 18-year-old who is one day older and has the same "immaturity, impetuosity, and failure to appreciate risks and consequences," *Miller*, 567 US at 477, as a 17-plus-364-day-old when that 17-year-old is likely to receive a less-severe sentence.[14] This arbitrary line-drawing for punishment of defendants with equal moral culpability neurologically does not pass scrutiny under the second *Lorentzen* factor.

3. SENTENCES IMPOSED IN OTHER JURISDICTIONS FOR THE SAME OFFENSE

The third *Lorentzen* proportionality factor is more neutral than the first two, though we also conclude that it slightly weighs in favor of an individualized sentencing procedure for 18-year-old defendants in these cases. In contrast to Michigan, 25 states and the District of Columbia do not legislatively *mandate* life without parole for equivalent first-degree murder, regardless of the age of the offender.[15] Likewise, Wash-

[14] Additionally, we recently held "that a parolable life sentence for a defendant who commits second-degree murder while a juvenile violates Article 1, § 16 of the Michigan Constitution." *Stovall*, 510 Mich at 322.

[15] These jurisdictions are: Alaska, Alaska Stat 12.55.125; District of Columbia, DC Code 22-2104; Georgia, Ga Code Ann 16-5-1; Idaho, Idaho Code 18-4004; Illinois, 730 Ill Comp Stat 5/5-4.5-20(a); Indiana, Ind Code 35-50-2-3; Kentucky, Ky Rev Stat Ann 532.030; Maine, Me Stat, tit 17-A, § 1603; Maryland, Md Code Ann, Crim Law 2-201; Montana, Mont Code Ann 45-5-102(2); Nevada, Nev Rev Stat 200.030(4); New Jersey, NJ Stat Ann 2c:11-3; New Mexico, NM Stat Ann 31-18-14; New York, NY Penal Law 70.00; North Dakota, ND Cent Code 12.1-32-01; Ohio, Ohio Rev Code Ann 2929.02; Oklahoma, Okla Stat, tit 21, § 701.9; Oregon, Or

ington, with a similarly broad punishment provision in its constitution, judicially found the neurological differences between juveniles and 18-year-olds to be nonexistent and mandated that young adults through the age of 20 also receive the same individualized sentencing protections as juveniles. See generally *In re Monschke*, 197 Wash 2d 305. Likewise, six more states only mandate life without parole for equivalent first-degree murder when there are proven aggravated circumstances.[16] This places Michigan among the minority of states that legislatively mandate life without parole for *every* perpetrator of first-degree murder above the age of 17.

While this increased leniency in other states is persuasive to us, we would be remiss if we did not note that, excluding Michigan, 17 states[17] and the federal

Rev Stat 163.115; Rhode Island, RI Gen Laws 11-23-2; South Carolina, SC Code Ann 16-3-20; Tennessee, Tenn Code Ann 39-13-202; Utah, Utah Code Ann 76-5-203; Virginia, Va Code Ann 18.2-10 and 18.2-32; West Virginia, W Va Code 61-2-1 and 61-2-2; Wisconsin, Wis Stat 939.50; and Wyoming, Wyo Stat Ann 6-2-101.

[16] These states are: California, Cal Penal Code 190.2; Connecticut, Conn Gen Stat 53a-35a and 53a-54b; Hawai'i, Haw Rev Stat 706-656 and 706-657; Kansas, Kan Stat Ann 21-6620, 21-5401(a)(6), and 21-6617; Texas, Tex Penal Code Ann 12.31 and 12.32; and Vermont, Vt Stat Ann, tit 13, §§ 2303 and 2311.

[17] The remaining states are: Alabama, Ala Code 13a-6-2(c); Arizona, Ariz Rev Stat Ann 13-1105(D); Arkansas, Ark Code Ann 5-10-101; Colorado, Colo Rev Stat 18-3-102 and 18-1.3-401; Delaware, Del Code Ann, tit 11, §§ 636(b)(1) and 4209(a); Florida, Fla Stat 782.04(1)(a) and (b) and 775.082(1)(a); Iowa, Iowa Code 707.2 and 902.1(1); Louisiana, La Stat Ann 14:30; Massachusetts, Mass Gen Laws, ch 265, §§ 1 and 2(a); Minnesota, Minn Stat 609.185 and 609.106; Mississippi, Miss Code Ann 97-3-21; Missouri, Mo Rev Stat 565.020; Nebraska, Neb Rev Stat 28-303 and 29-2520; New Hampshire, NH Rev Stat Ann 630:1-a; North Carolina, NC Gen Stat 14-17(a); Pennsylvania, 18 Pa Cons Stat 2502 and 1102; and South Dakota, SD Codified Laws 22-16-4 and 22-6-1.

government[18] do still mandate life without parole for equivalent first-degree murder. Michigan is not as overwhelming of a national outlier in this case as it was in *Bullock*, 440 Mich at 40 ("[N]o other state in the nation imposes a penalty even remotely as severe as Michigan's for mere possession of 650 grams or more of cocaine."), or *Lorentzen*, 387 Mich at 179 ("Only one state, Ohio, has as severe a minimum sentence for the sale of marijuana as Michigan.").

Nonetheless, we are persuaded that our Constitution mandates that 18-year-olds be treated in the same manner as juveniles in these cases. We examine today an irrevocable sentence, offering no hope of release, for a group of defendants that are neurologically less culpable than others serving the same or, oftentimes, less-severe sentences for the same crimes. Like Washington, which has a similarly broad constitutional provision as our Const 1963, art 1, § 16, we find that our sentencing scheme does not comport with our Constitution's mandate forbidding excessively harsh punishment. *In re Monschke*, 197 Wash 2d at 307, 311 & n 6, citing Wash Const 1889, art 1, § 14. The majority of jurisdictions now reflect a society and a criminal-punishment system more "enlightened by a humane justice" than Michigan's current sentencing scheme set forth in this matter. See *Lorentzen*, 387 Mich at 178 (quotation marks and citation omitted).

4. THE GOAL OF REHABILITATION

As to the fourth and final *Lorentzen* proportionality factor, it cannot be disputed that the goal of rehabilitation is not accomplished by mandatorily sentencing an individual to life behind prison walls without any

[18] 18 USC 1111.

hope of release. This is a long-established principle. See *Graham*, 560 US at 74 ("A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation."). Without hope of release, 18-year-old defendants, who are otherwise at a stage of their cognitive development where rehabilitative potential is quite probable, are denied the opportunity to reform while imprisoned.

Rehabilitation is a specific goal of our criminal-punishment system. *Bullock*, 440 Mich at 34. Indeed, it is the only penological goal enshrined in our proportionality test as a "criterion rooted in Michigan's legal traditions," *Bullock*, 440 Mich at 34, despite the *Lorentzen* Court's clear awareness of those other penological goals cited and relied on by the dissent, *id*. at 34-35; *Lorentzen*, 387 Mich at 180-181. However, the current system of punishment of 18-year-old first-degree murderers to life without the possibility of parole " 'forswears altogether the rehabilitative ideal.' " *Miller*, 567 US at 473, quoting *Graham*, 560 US at 74. And because an 18-year-old defendant has a "child's capacity for change," as articulated in *Miller*, 567 US at 473, it is particularly antithetical to our Constitution's professed goal of rehabilitative sentences to uniformly deny this group of defendants the chance to demonstrate their ability to rehabilitate themselves. *Bullock*, 440 Mich at 34.

In sum, after considering all four factors of the proportionality test from *Lorentzen* and *Bullock*, we conclude that our Constitution prohibits imposing sentences of mandatory life without parole for 18-year-old defendants convicted of first-degree murder, given that their neurological characteristics are identical to those of juveniles, as articulated in *Miller*, 567 US at 471-479. We hold that Michigan's sentencing scheme man-

dating that 18-year-old defendants convicted of first-degree murder receive a sentence of life imprisonment without the possibility of parole is cruel or unusual punishment under Const 1963, art 1, § 16.

E. PARKS'S MANDATORY LIFE-WITHOUT-PAROLE SENTENCE IS UNCONSTITUTIONAL

After committing his crimes at age 18, Parks was automatically sentenced to spend the rest of his life in prison under the first-degree murder statute, MCL 750.316. The sentencing court in this case gave no consideration to any of the attributes of youth that Parks shared with juvenile defendants. Nor was Parks given the same benefit of a specialized procedure under either MCL 769.25a or MCL 769.25 as afforded to juveniles neurologically identical to him. Instead, his sentence was applied automatically. This procedure violates our Constitution and requires that Parks be resentenced.

While Parks argues that the sentence he received is unconstitutional as applied to him because of the mitigating circumstances of his offense and his person, our inquiry today does not require us to examine anything specific to Parks at this juncture. Instead, we hold that it is the application of mandatory life without parole to those 18-year-olds—some of whom will inevitably share the same mitigating characteristics of youth as juveniles—that offends our Constitution, not the application of this sentencing scheme to Parks specifically. In other words, we agree with the Washington Supreme Court that "no meaningful neurological bright line exists between age 17 and age 18"; to treat those two classes of defendants differently in our sentencing scheme is disproportionate to the point of being cruel under our Constitution. See *In re Monschke*,

197 Wash 2d at 326; *Bullock*, 440 Mich at 33-34. Because Parks was not given the benefit of the post-*Miller* and *Montgomery* individualized sentencing procedure enshrined in Michigan law, his mandatory life-without-parole sentence is unconstitutional.

The attributes of youth must be considered to ensure that the sentencing of 18-year-old defendants found guilty of first-degree murder passes constitutional muster. To facilitate this requirement, the same protections provided to juveniles pursuant to MCL 769.25, as described in *Taylor*, 510 Mich 112, must be extended to 18-year-old offenders. This requires that the prosecutor move to sentence these defendants to life without parole under the procedure outlined in the statute and that the sentencing court provide these defendants with a *Miller* hearing before deciding to sentence them to life without parole. See MCL 769.25(2), (3), and (6). Otherwise, such defendants will be sentenced to a term of years in accordance with MCL 769.25(9). We hold that, in order to comport with our Constitution, *all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants.[19] Because Parks was sen-

[19] This includes all the protections enumerated in our caselaw interpreting this statute. The prosecutor will have the burden of proof and persuasion to demonstrate by clear and convincing evidence that an 18-year-old defendant should receive a sentence of life without parole. See *Taylor*, 510 Mich at 129. As with juveniles, the default sentence shall be a term of years, with a minimum sentence of 25 to 40 years' imprisonment and a maximum sentence of at least 60 years' imprisonment. See *id*. at 130; MCL 769.25(9). If the prosecutor elects not to move for life without parole—or does but fails to meet its burden of proof—these defendants should be sentenced to the applicable term of years. MCL 769.25(4) and (9). In such sentencing hearings, these defendants are also entitled to have their attributes of youth, such as those described in *Miller*, considered, in accordance with *People v Boykin*, 510 Mich 171; 987 NW2d 58 (2022), and *People v Tate*, 510 Mich 171; 987 NW2d 58 (2022).

tenced without consideration of the attributes of youth, his sentence is unconstitutional, and he must be resentenced.

III. CONCLUSION

We hold that mandatorily subjecting 18-year-old defendants convicted of first-degree murder to a sentence of life without parole violates the principle of proportionality derived from the Michigan Constitution, *Lorentzen*, 387 Mich at 176-181; *Bullock*, 440 Mich at 33-34, and thus constitutes unconstitutionally cruel punishment under Const 1963, art 1, § 16. This renders Parks's automatic sentence of life without parole unconstitutional. Parks and other 18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and our caselaw, as opposed to the automatic sentencing scheme in MCL 750.316(1). Therefore, we reverse Part II(B)(4) of the Court of Appeals opinion, vacate Parks's sentence for first-degree murder, and remand this case to the Genesee Circuit Court for Parks to be resentenced. If the prosecutor intends to move for the imposition of a life-without-parole sentence, the prosecutor shall have 90 days from the date of this opinion to file such a motion. MCL 769.25(3). Otherwise, Parks shall be resentenced to a term of years, pursuant to MCL 769.25(9). In all other respects, we deny leave to appeal for failure to persuade the Court of the need for review. On remand, the Genesee Circuit Court shall also redetermine a portion of defendant's restitution order pursuant to the decision of the Court of Appeals.

MCCORMACK, C.J., and BERNSTEIN and CAVANAGH, JJ., concurred with WELCH, J.

BERNSTEIN, J. (*concurring*). The United States Supreme Court has held that imposing a sentence of mandatory life imprisonment without the possibility of parole on individuals who were under 18 years old when they committed a crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. See *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016). Before *Miller*, all offenders in Michigan who were convicted of first-degree murder were sentenced to mandatory life imprisonment without the possibility of parole, regardless of their age. In accordance with United States Supreme Court precedent, the Michigan Legislature has since codified protections for juvenile offenders and enacted a scheme through which juvenile offenders are instead sentenced to a term of years in prison unless the prosecution moves for a sentence of life imprisonment without the possibility of parole and demonstrates that such a sentence is proportional. See MCL 769.25;[1] *People v Boykin*, 510 Mich 171, 179-180; 987 NW2d 58 (2022) (explaining how *Miller* effected MCL 769.25 and how MCL 769.25 operates). The statutory language makes clear that when juvenile offenders are convicted of first-degree murder, the trial court must consider the factors listed in *Miller*, as well as any other relevant criteria, and explain its rationale clearly and specifically on the record before sentencing a juvenile

[1] MCL 769.25a was passed by the Legislature at the same time as MCL 769.25, but rather than being used to guide the procedure for initial sentencing or resentencing decisions for juvenile offenders, MCL 769.25a guides the procedure for resentencing juveniles who had been sentenced to mandatory life without parole before its enactment. MCL 769.25a is not relevant to this case because defendant will be resentenced according to MCL 769.25.

offender to life imprisonment without the possibility of parole. MCL 769.25(6) and (7).

This case asks us to consider whether defendant, who was 18 at the time he committed a crime that resulted in a first-degree murder conviction, is entitled to these same protections. I agree with the majority's thorough analysis of the test outlined in *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992). Extending the protections offered by MCL 769.25 to 18-year-old offenders fits squarely within what Michigan's Constitution requires under its prohibition against "cruel *or* unusual" punishment. Const 1963, art 1, § 16 (emphasis added). As the majority opinion states, the "cruel or unusual" punishment test is based on proportionality. See *Bullock*, 440 Mich at 32, 40-41. For the reasons explained by the majority, the imposition of mandatory sentences of life imprisonment without the possibility of parole on 18-year-old offenders violates this proportionality principle. Although I concur fully with the majority, I write separately to highlight additional reasons that support this position.

I. MORE LOCAL AND INDIVIDUALIZED CONTROL OVER SENTENCING DECISIONS

Under the new sentencing scheme enacted after *Miller*, when a juvenile offender commits a crime for which a life sentence without the possibility of parole is possible, it is the local prosecutor who must decide whether to pursue such a sentence. MCL 769.25(2). If the local prosecutor believes such a punishment is appropriate, they must file a motion with the court. MCL 769.25(3). The court must then conduct a hearing on that motion. MCL 769.25(6). At that hearing, the local prosecutor is required to prove that the defendant should be sentenced to life imprisonment without the

possibility of parole, taking into account the *Miller* factors and all the mitigating and aggravating circumstances relevant to the defendant and the crime. See *People v Taylor*, 510 Mich 112, 129; 987 NW2d 132 (2022) (holding that the burden of proof is on the prosecutor at a hearing held under MCL 769.25). If the prosecutor declines to file such a motion for any defendant of this class, that defendant may only be sentenced to a term of years. MCL 769.25(4); see also *Boykin*, 510 Mich at 180 n 2.

Once the local prosecutor makes the decision to pursue a sentence of life imprisonment without the possibility of parole, the authority to make the sentencing decision remains local, because the trial court must then, after hearing and considering all the evidence presented by the prosecution and defendant, decide whether that is a proportionate sentence. If the trial court determines that the local prosecutor has not proven the sentence to be proportionate, the trial court shall impose an appropriate term-of-years sentence. MCL 769.25(9).

Understanding how these statutes work is important for understanding what the majority's holding means. It does not mean that we are punishing the most severe crime of first-degree murder less severely. Instead, it means that 18-year-old offenders convicted of the most serious crimes may not be *automatically* sentenced to the harshest sentences without first being afforded an additional layer of process. Local prosecutors may still advocate for youthful offenders to be sentenced to life imprisonment without the possibility of parole, and local trial courts may still agree. This decision merely underscores one of the foundations of a functioning criminal-justice system—that procedure

matters for *all* criminal defendants, even those who commit the most serious crimes. See, e.g., *People v Peeler*, 509 Mich 381, 403-404; 984 NW2d 80 (2022) (BERNSTEIN, J., concurring).

Sentencing youthful offenders who have committed the most serious crimes is an exceptionally daunting task. The Legislature has concluded that the local prosecutor and local trial court should be responsible for making these difficult decisions, and it is these local actors who will be able to make the most informed decisions about individual defendants. Having now decided that there is no meaningful difference between a 17- and 18-year-old offender, this opinion merely requires these local actors to engage in an additional layer of process before sentencing 18-year-old offenders to life imprisonment without the possibility of parole.

II. PROPORTIONALITY TO THE OFFENSE AND THE OFFENDER

The United States Supreme Court has consistently recognized that "youth matters in sentencing." *Jones v Mississippi*, 593 US at ___, ___; 141 S Ct 1307, 1314; 209 L Ed 2d 390 (2021). In several opinions, the Supreme Court has articulated factors, which have colloquially become known as the "*Miller* factors," that sentencing courts must consider before sentencing youthful offenders to life imprisonment without the possibility of parole. As the majority notes, the Supreme Court has grounded these factors in " 'developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.' " *Miller*, 567 US at 471-472, quoting *Graham v Florida*, 560 US 48, 68; 130 S Ct 2011; 176 L Ed 2d 825 (2010). In other words, internal and external factors associated with youthful brains

and the juvenile experience mean that such offenders are less culpable or less deserving of the harshest punishments for even the most severe crimes without some individualized consideration of how the *Miller* factors have affected an individual offender.

To provide guidance, the Supreme Court has tried to draw a bright line at age 18 to demarcate the age of maturity, at which point a youthful offender is no longer eligible for these constitutional protections. The Supreme Court first drew this bright line in *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), holding that the death penalty is prohibited for all offenders under age 18 who are convicted of capital crimes. *Roper* and its progeny show the difficulties and flaws associated with such a bright-line cutoff, and I am concerned that applying a bright line in this way might not be the best approach to resolve the difficult question of how to sentence offenders who commit the most serious offenses.

First, because the federal constitutional protection against cruel and unusual punishments requires analyzing " 'the evolving standards of decency that mark the progress of a maturing society,' " any conclusions that might be drawn could change in a short amount of time. *Id*. at 561, quoting *Trop v Dulles*, 356 US 86, 101; 78 S Ct 590; 2 L Ed 2d 630 (1958). *Roper*, which was decided in 2005, offered a time line for how the Supreme Court arrived at its holding. This history showed that, in 1988, a plurality of the Supreme Court determined that the constitutional standards of decency did not permit the execution of anyone under the age of 16 at the time of a crime. *Roper*, 543 US at 561, citing *Thompson v Oklahoma*, 487 US 815; 108 S Ct 2687; 101 L Ed 2d 702 (1988). The next year, the Supreme Court held that the standards of decency

allowed for the imposition of the death penalty for those over 16. *Roper*, 543 US at 562, citing *Stanford v Kentucky*, 492 US 361; 109 S Ct 2969; 106 L Ed 2d 306 (1989). The result of *Thompson* and *Stanford* meant that, by 1989, the bright-line cutoff was established at age 16 for death-penalty cases. On the same day that *Stanford* was decided, the Supreme Court held that the Constitution did not mandate an exemption from the death penalty for offenders with intellectual disabilities. *Roper*, 543 US at 562, citing *Penry v Lynaugh*, 492 US 302; 109 S Ct 2934; 106 L Ed 2d 256 (1989). But by 2002, the same standards of decency had evolved even further, resulting in the holding that the death penalty *was* cruel and unusual for offenders with intellectual disabilities. *Roper*, 543 US at 563, citing *Atkins v Virginia*, 536 US 304; 122 S Ct 2242; 153 L Ed 2d 335 (2002). Likewise, this evolution of the standards of decency led to the holding that the death penalty was cruel and unusual for *all* juvenile offenders, not just those under the age of 16. *Roper*, 543 US at 564, 578.

Over a period of just 16 years, the bright-line cutoff for death-penalty eligibility jumped from age 16 to age 18, and over a period of less than 25 years, the Supreme Court went from allowing the *death penalty* for 17-year-old offenders to holding that mandatory sentences of *life imprisonment without the possibility of parole* are unconstitutionally cruel and unusual for all juvenile offenders. In other words, evolving standards of decency have changed enough to both redefine what type of punishment is viewed as cruel and unusual and the breadth of the class afforded protection from such punishment. These changes show the Supreme Court's continued commitment to reexamine the applicable standards of decency for youthful offenders, which are ever evolving.

Second, *Roper* showed the very flaws associated with drawing a bright line when it noted that

> [d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest. [*Id*. at 574.]

The Supreme Court thus acknowledged that drawing the line at 18 was both overinclusive and underinclusive.

I agree with *Roper* that it was necessary, although difficult, to draw some line as the only way to ensure that a class of youthful offenders would receive constitutional protections against cruel and unusual punishment. However, having a line in place does not mean that such a line should represent both the floor and ceiling of constitutional protections, especially when we already understand that such a line might not be sufficiently protective. There might be a way to both ensure constitutional protections for an entire class of offenders while also mitigating the underinclusiveness problem associated with drawing a line.

Consider, again, the fact that *Roper* believed that the standards of decency for juvenile offenders had evolved because of a parallel evolution of the standards of decency for offenders with intellectual disabilities

from *Penry* to *Atkins*. See *Roper*, 543 US at 562-563. *Atkins*, which held that the death penalty was constitutionally impermissible for offenders with intellectual disabilities, contained language that was eventually used in *Miller* to support the holding that mandatory sentences of life imprisonment without the possibility of parole are constitutionally impermissible for juvenile offenders. Again, *Miller* stressed that several factors associated with the underdeveloped brains of juveniles made juvenile offenders less culpable and more capable of rehabilitation than adult offenders. *Atkins* similarly outlined several reasons why offenders with intellectual disabilities were less culpable for their crimes and capable of rehabilitation. *Atkins*, 536 US at 306-307 (explaining that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, however, [these offenders] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [them]"). Still, although *Miller* and *Atkins* use similar language and reasoning, the bright line that *Miller* establishes for juveniles means that under *Miller*, a nonjuvenile offender with an intellectual disability could receive a mandatory sentence of life imprisonment without the possibility of parole and would not have the benefit of a hearing to demonstrate that such a sentence was not proportionate to the offense and the offender. There ought to be a better way to sentence such offenders.

To avoid these downfalls, we could instead consider that all offenders ages 18 and younger have an irrebuttable presumption of youth and diminished capacity, as recognized by the majority opinion. Because the presumption is irrebuttable, all offenders within this class must be afforded the processes outlined in MCL

769.25 before they may be sentenced to life imprisonment without the possibility of parole. However, we could enable defendants who are older than 18 to assert that they possess some qualities—such as an intellectual disability or other mitigating circumstances—that render their brains more like someone who is age 18 or younger. In other words, once offenders reach the age of 19, the irrebuttable presumption of youthfulness would transform into a *rebuttable* presumption of *maturity* and a defendant over the age of 18 would bear the burden of demonstrating the need for a hearing to ensure that a sentence of life without the possibility of parole was proportionate. I believe that the additional process associated with a shifting presumption rather than a bright line would help to alleviate the problem associated with drawing a line that we know will be, at least in part, underinclusive.

In sum, adopting a bright-line rule is likely to leave out some individuals who need additional protections. This effect is consequential, as this cutoff would determine whether a defendant may be *mandatorily* sentenced to life without the possibility of parole and without the opportunity to show that they had diminished culpability. It should be incumbent on us to find a way to ensure that those individuals who are the most vulnerable are able to access sufficient process before they are automatically sentenced to serve their lives in prison. Accordingly, I believe that a better approach to these difficult sentencing decisions would be through a shifting presumption that accounts for relevant individual attributes, rather than a bright-line rule.

III. CONCLUSION

I concur fully with the majority opinion. This result will shift more control over difficult sentencing decisions to local actors, which I believe can only help when making difficult choices on an individualized basis. However, there are problems associated with drawing a bright line under which age is the only criterion in determining whether a mandatory sentence of life without the possibility of parole is cruel or unusual. Accordingly, I believe that a better approach would be to institute a shifting age-based presumption through which offenders could move to seek additional process based on other, non-age-based qualities of diminished culpability, which could entitle some offenders over the age of 18 to the same protections as youthful offenders. Because this case does not present the opportunity for us to reach this issue, I concur with the majority's analysis and conclusion.

ZAHRA, J. (*dissenting*). I join Justice CLEMENT's dissenting opinion in full. For the reasons stated in *People v Stovall*, 510 Mich 301, 338 n 24, 343 n 25; 987 NW2d 85 (2022) (ZAHRA, J., dissenting), I would accept the prosecution's invitation to revisit our caselaw interpreting Const 1963, art 1, § 16—specifically whether Article 1, § 16 provides greater protection than the Eighth Amendment of the United States Constitution and whether Article 1, § 16 contains a proportionality guarantee.

VIVIANO, J., concurred with ZAHRA, J.

CLEMENT, J. (*dissenting*). In *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012),

the United States Supreme Court prohibited mandatory life-without-parole (LWOP) sentences for offenders who were *under* 18 years old at the commission of their crime. Defendant asks this Court to extend that rule to offenders who *were* 18 years old at the commission of their crime. Because I do not believe mandatory LWOP as it pertains to 18-year-old offenders is unconstitutional under either the Eighth Amendment or Const 1963, art 1, § 16, I would not do so.

I. FACTUAL AND LEGAL BACKGROUND

I agree with the majority's recitation of the facts. In short, defendant was 18 years old when he aided and abetted his cousin in committing first-degree murder. The trial court imposed an LWOP sentence, which is mandatory under MCL 750.316(1). Because defendant was 18 years old at the time of his offense, this sentence is not prohibited by *Miller*, 567 US at 465, which held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " See also *Montgomery v Louisiana*, 577 US 190, 212; 136 S Ct 718; 193 L Ed 2d 599 (2016) (holding that *Miller* was a substantive rule of law that applied retroactively).

Defendant now argues that this Court should extend *Miller*'s prohibition on mandatory LWOP to defendants who were 18 years old when they committed their crimes. He points to two possible bases on which this Court could do so—the first is the Eighth Amendment of the United States Constitution, which prohibits

"cruel and unusual punishments,"[1] and the second is Article 1, § 16 of our state Constitution, which prohibits "cruel or unusual punishment."[2] I agree with the majority that the Eighth Amendment does not prohibit defendants who were 18 years old at the time of their crime from being sentenced to mandatory LWOP.[3] But contrary to the majority, I do not believe that Const 1963, art 1, § 16 prohibits that either.

II. ANALYSIS

Whereas the Eighth Amendment prohibits "cruel and unusual punishments," Const 1963, art 1, § 16 prohibits "cruel or unusual punishment." This difference in language has led this Court to interpret our

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[1] US Const, Am VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.") (emphasis added).

[2] Const 1963, art 1, § 16 ("Excessive bail shall not be required; excessive fines shall not be imposed; *cruel or unusual punishment shall not be inflicted*; nor shall witnesses be unreasonably detained.") (emphasis added).

[3] There are several federal decisions declining to extend *Miller*. See, e.g., *United States v Dock*, 541 F Appx 242, 245 (CA 4, 2013); *United States v Davis*, 531 F Appx 601, 608 (CA 6, 2013); *Wright v United States*, 902 F3d 868, 872 (CA 8, 2018); *United States v Sierra*, 933 F3d 95, 97 (CA 2, 2019); *Ong Vue v Henke*, 746 F Appx 780, 783 (CA 10, 2018). See also *Doyle v Stephens*, 535 F Appx 391, 395 (CA 5, 2013) (declining to extend the prohibition on the death penalty for juvenile offenders from *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005)). The only federal case I am aware of that extended the holding of *Miller* was *Cruz v United States*, unpublished opinion of the United States District Court for the District of Connecticut, issued March 29, 2018 (Case No. 11-CV-787). But that opinion was later vacated and remanded by the United States Court of Appeals for the Second Circuit in *Cruz v United States*, 826 F Appx 49, 52 (CA 2, 2020) ("[W]e conclude that the district court erred when it held that the Eighth Amendment forbids a mandatory life sentence for a defendant who was eighteen at the time of his offense.").

constitutional provision as providing broader protection. *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992).

We presume a statute is constitutional "unless the contrary clearly appears[.]" *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). "[I]n case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation." *Id*. Specific to the mandatory LWOP sentence at issue here, "[l]egislatively mandated sentences are presumptively proportional and presumptively valid." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011).

A. THE APPLICATION OF *BULLOCK*'S FOUR-FACTOR TEST

In *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972), and *Bullock*, our Court set forth a four-part test to determine whether a sentence violates Const 1963, art 1, § 16. Under that test, we must consider: (1) "the severity of the sentence imposed compared to the gravity of the offense," (2) "the penalty imposed for the offense compared to penalties imposed on other offenders" in Michigan, (3) "the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states," and (4) "whether the penalty imposed advances the penological goal of rehabilitation." *People v Carp*, 496 Mich 440, 520; 852 NW2d 801 (2014), cert gtd and opinion vacated sub nom on other grounds *Carp v Michigan*, 577 US 1186 (2016), citing *Bullock*, 440 Mich at 33-34, and *Lorentzen*, 387 Mich at 176-181.

1. THE GRAVITY OF THE OFFENSE VERSUS THE SEVERITY OF THE PUNISHMENT

To apply that test, we first consider the gravity of the offense as opposed to the severity of the punishment. First-degree murder is undoubtedly a very serious offense, arguably the most serious offense one can commit. Accordingly, a very severe sentence is proportionate. Mandatory LWOP is, undoubtedly, just that. It is, as the majority notes, the most severe penalty in Michigan. The punishment fits the crime. As this Court stated in *Carp*, 496 Mich at 514-515:

> [F]irst-degree murder is almost certainly the gravest and most serious offense that an individual can commit under the laws of Michigan—the premeditated taking of an innocent human life. It is, therefore, unsurprising that the people of this state, through the Legislature, would have chosen to impose the most severe punishment authorized by the laws of Michigan for this offense.[4]

See also *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976) (stating that "the punishment exacted [i.e., mandatory LWOP] is proportionate to the crime [of felony murder]"). While I do not take the mandatory imposition of LWOP lightly, it is commensurate with the gravity of the offense in this case.

The majority contends that the penalty is more severe for defendant than it is for older adults because those who committed crimes at his age are more likely to act recklessly and to be susceptible to peer pressure, as they are still developing neurologically. They are also more likely to mature and rehabilitate. I do not argue with the science the majority discusses. How-

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[4] See also *People v Manning*, 506 Mich 1033, 1035 (2020) (MARKMAN, J., concurring), quoting *Carp*, 496 Mich at 514-515.

ever, I do not believe that science is sufficient to show that the first factor weighs in favor of finding the penalty unconstitutional.

We are not the first court to consider that young adults are still developing neurologically and still have some juvenile traits. The United States Supreme Court recognized young adults' ongoing neurological development in 2005 in *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), in which it found that the execution of juvenile offenders was unconstitutional. Tellingly, the Court commented:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. [*Id*. at 574.]

I find that reasoning persuasive. A line must be drawn, and that line will always lead to some arbitrary results, as there will be no appreciable difference between a person one day before his 18th birthday versus on his 18th birthday—or now, under the majority's holding, one day before his 19th birthday versus on his 19th birthday. Though the age at which society considers a person an adult has changed and is not consistent across every activity, it is still true that 18 is the general age at which society considers someone an adult. *Roper*, 543 US at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.").[5] Even if 18-year-

[5] Our Legislature has also set the age of majority for most purposes at the age of 18. See MCL 722.52(1) ("Except as otherwise provided in the state constitution of 1963 and subsection (2), notwithstanding any other

olds are not so well-developed neurologically as 27-year-olds, they are sufficiently neurologically developed to make major decisions about their lives.

Moreover, first-degree murder, in particular, is an obviously serious offense, the gravity of which I believe 18-year-olds are generally more than able to comprehend. Consequently, even given young adults' ongoing neurological development, I still believe that the severity of the punishment fits the gravity of the offense for this class of defendants. This factor weighs in favor of finding the penalty constitutional.

Also, I note that the majority's holding is overbroad when compared to some of the facts it appears to find relevant in regard to the first factor. First, the majority notes that 18-year-olds are uniquely susceptible to peer pressure. However, its holding eliminates mandatory LWOP even in cases in which there is no evidence that a defendant acted as a result of peer pressure. Additionally, the majority emphasizes that defendant was not found guilty as a principal actor but rather as an aider and abettor, noting that defendant's conviction is "based on a theory of aiding and abetting" and that "Parks was not the principal actor in this particular murder . . . ." However, in this context there is no legal difference. MCL 767.39 ("Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."). I fail to see why the majority mentions

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provision of law to the contrary, a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age.").

defendant's status multiple times when it makes no difference as to defendant's legal culpability or to the majority's holding, as the holding is applicable to 18-year-olds who are found guilty as principals.[6]

2. SENTENCES IMPOSED IN MICHIGAN FOR OTHER OFFENSES

Second, we consider the sentences we impose for other offenses. I believe this factor also weighs in favor of finding the penalty constitutional. All adults 18 and older who commit first-degree murder face mandatory LWOP. Adults who commit arguably less-serious offenses can also still face mandatory LWOP. As the majority notes, mandatory LWOP is the penalty imposed on adult defendants guilty of first-degree murder, first-degree criminal sexual conduct, and various other offenses committed with an intent to kill or resulting in death. See, e.g., MCL 791.234(6) (listing various offenses subject to mandatory LWOP); MCL 750.316 (first-degree murder); MCL 750.520b (first-degree criminal sexual conduct); MCL 750.16(5) (adulteration of drugs with intent to kill); MCL 750.18(7)

[6] The majority responds that *Miller* referred to the defendant's role as an aider and abettor. Because I am bound by *Miller*'s interpretation of the Eighth Amendment, *People v Victor*, 287 Mich 506, 514; 283 NW 666 (1939), I express no opinion on the merits of its reasoning. However, our Court is the final arbiter of our state's Constitution. *People v Tanner*, 496 Mich 199, 221-222; 853 NW2d 653 (2014) ("[W]e need not, and cannot, defer to the United States Supreme Court in giving meaning to the [Michigan Constitution]. Instead, it is this Court's obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].' ") (alterations in original). Though *Miller* referred to the defendant's role as an aider and abettor and proceeded to hold that mandatory LWOP was prohibited for all juvenile offenders, I still believe there is a disconnect between relying on this specific defendant's role—a role with no legal significance—and issuing an opinion that will affect defendants who played a different role.

(mixing drugs improperly with intent to kill); MCL 750.211a(f) (possession with intent to unlawfully use an explosive device causing death); MCL 333.17764(7) (mislabeling drugs with intent to kill and causing death); MCL 750.200i(2)(e) (possession of a harmful biological, chemical, radioactive, or electronic device resulting in death). Mandatory LWOP for first-degree murder is not out of place when considered alongside the other punishments our state imposes for other offenses.

The majority contends that because of his young age, defendant's life sentence is, practically, longer than the life sentence of an older defendant. Of course it is true that defendant is likely to spend more time imprisoned than an older offender, but we do not generally consider how long a defendant will, as a practical matter, serve a sentence given his or her life expectancy. When appellants fairly frequently contend that their term-of-years sentence is a de facto life sentence because of their more advanced age, our Court and the Court of Appeals routinely reject such arguments.[7] I see no reason why, in that scenario, we would refuse to consider that a term-of-years sentence is a de facto life sentence but, in the instant case, we would consider—relatedly but in reverse—that a particular life sentence is a de facto longer term-of-years sentence than other life sentences.[8]

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[7] See, e.g., *People v Washington*, unpublished per curiam opinion of the Court of Appeals, issued July 25, 2019 (Docket No. 343987), p 7 (rejecting the defendant's argument that his term-of-years sentence was a de facto life sentence); *People v Williams*, unpublished per curiam opinion of the Court of Appeals, issued February 20, 2018 (Docket No. 335401), p 9 (same).

[8] The majority contends that *Miller* also considered how long juvenile offenders will spend in prison. However, again, while I express no opinion on *Miller*'s merits insofar as we are bound by the United States

The majority also notes that defendant will spend more time imprisoned than "most of his equally culpable juvenile offenders." However, it is not the case that defendant is as equally culpable as other juvenile offenders. Even if there is no drastic difference between an older 17-year-old and a younger 18-year-old, surely most 18-year-old defendants are more mature than most 17-, or 16-, or 15-year-old defendants. As *Roper* stated, a line must be drawn somewhere. Defendant is older than juvenile offenders guilty of the same crime, and therefore, he is presumably more mature and more culpable.

Related to the need for line-drawing, the majority notes the unfairness that offenders only a few days younger than defendant are sentenced more leniently "despite the two offenders' identical neuroplasticity[.]" But the majority's holding simply replaces that unfairness with another—that now defendants who are 18 years and 364 days old will be sentenced more leniently than defendants who are 19 years old. The majority readily admits that the science does not support that dividing line either.

3. PENALTIES IMPOSED FOR THE SAME OFFENSE IN OTHER JURISDICTIONS

For the third factor we consider the penalties that other jurisdictions impose for first-degree murder. The majority says that this factor is more neutral but weighs slightly in favor of finding the instant penalty unconstitutional. I do not see how that is the case. As the majority notes, 17 other states and the federal

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Supreme Court's decision regarding the scope of the Eighth Amendment, it is up to our Court to interpret Const 1963, art 1, § 16. See note 6 of this opinion. Consequently, I am not persuaded that a line of reasoning is unassailable simply because *Miller* appears to use it as well.

government allow mandatory LWOP for offenders who were 18 and older at the commission of the crime.[9] Michigan is hardly an outlier. In past cases in which we found sentences unconstitutional, there were few or no states with penalties so harsh as the one we imposed. See *Bullock*, 440 Mich at 40 ("[*N*]*o other state in the nation* imposes a penalty even remotely as severe as Michigan's . . . . Of the remaining 49 States, only Alabama provides for a mandatory sentence of life imprisonment without possibility of parole for a first-time drug offender, and then only when a defendant possesses ten kilograms or more of cocaine.") (quotation marks and citation omitted; emphasis added); *Lorentzen*, 387 Mich at 179 ("*Only one state . . . has as severe a minimum sentence* for the sale of marijuana as Michigan.") (emphasis added).

The majority relies on *In re Monschke*, 197 Wash 2d 305; 482 P3d 276 (2021), in which the Washington Supreme Court extended the prohibition on mandatory LWOP to 20-year-old offenders based on Washington's

[9] Alabama, Ala Code 13a-6-2(c); Arizona, Ariz Rev Stat Ann 13-1105(D); Arkansas, Ark Code Ann 5-10-101; Colorado, Colo Rev Stat 18-3-102 and 18-1.3-401; Delaware, Del Code Ann, tit 11, §§ 636(b)(1) and 4209(a); Florida, Fla Stat 782.04(1)(a) and (b) and 775.082(1)(a); Iowa, Iowa Code 707.2 and 902.1(1); Louisiana, La Stat Ann 14:30; Massachusetts, Mass Gen Laws, ch 265, §§ 1 and 2(a); Minnesota, Minn Stat 609.185 and 609.106; Mississippi, Miss Code Ann 97-3-21; Missouri, Mo Rev Stat 565.020; Nebraska, Neb Rev Stat 28-303 and 29-2520; New Hampshire, NH Rev Stat Ann 630:1-a; North Carolina, NC Gen Stat 14-17(a); Pennsylvania, 18 Pa Cons Stat 2502 and 1102; and South Dakota, SD Codified Laws 22-16-4 and 22-6-1. See also 18 USC 1111(b); 18 USC 5031 (defining "juvenile" as "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday" and "juvenile delinquency" as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult").

state constitution. However, the majority does not thoroughly consider the reasoning in *Monschke* in order to determine whether it is persuasive.[10]

I do not find *Monschke*'s reasoning persuasive. Washington has two tests under which it reviews the constitutionality of punishments. Both tests have some overlap with ours. But *Monschke* used neither. First, it has a "proportionality test," which consists of four factors.[11] Three of the four factors of that test are similar (to some extent) to our factors from *Lorentzen* and *Bullock*: "(1) *the nature of the offense*; (2) the legislative purpose behind the habitual criminal statute; (3) *the punishment defendant would have received in other jurisdictions for the same offense*; and (4) *the punishment meted out for other offenses in the same jurisdiction*." *State v Fain*, 94 Wash 2d 387, 397; 617 P2d 720 (1980) (en banc) (emphasis added). If *Monschke* had reached its conclusion after applying these similar factors, its reasoning would perhaps be of some persuasive value in determining whether mandatory LWOP for 18-year-olds violates our Constitution as well. However, *Monschke* did not apply this test.

Washington also has a "categorical bar analysis," which it used in *State v Bassett*, 192 Wash 2d 67, 90; 428 P3d 343 (2018), to hold that juveniles could not be sentenced to LWOP, even if it were not mandatory. That categorical-bar analysis has only two factors, one of which is similar to one of ours. *Id*. at 83 (setting out

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[10] See *People v DeRousse*, 341 Mich App 447, 456; 991 NW2d 596 (2022) (" 'Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value.' "), quoting *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

[11] *Monschke* attributes this test to *State v Fain*, 94 Wash 2d 387, 397; 617 P2d 720 (1980) (en banc).

the categorical-bar test as "(1) *whether there is objective indicia of a national consensus against the sentencing practice at issue* and (2) the court's own independent judgment based on ' "the standards elaborated by controlling precedents and by the [c]ourt's own understanding and interpretation of the [cruel punishment provision]'s text, history, . . . and purpose" ' ") (citation omitted; emphasis added; alterations in original). Again, if *Monschke* had used this test, at least its analysis of its first factor might be persuasive as to our third factor. But *Monschke* did not use that test either. *Monschke*, 197 Wash 2d at 328 ("No [proportionality test] or categorical bar analysis is necessary to reach this decision.").

Instead, the reasons *Monschke* considered were (1) that United States Supreme Court jurisprudence has grown more protective of young offenders, *id*. at 313-317; (2) that courts do not always defer to legislative bright lines when striking down punishments, such as in *Hall v Florida*, 572 US 701; 134 S Ct 1986; 188 L Ed 2d 1007 (2014), *Monschke*, 197 Wash 2d at 317-319; (3) that the age of majority is flexible, depending on context, *id*. at 319-321; and (4) that neurological science reveals no meaningful difference in neurological development between 17- and 18-year-olds, *id*. at 321-325. Those propositions might all be true, but they are not very persuasive in showing that under our four-factor test, mandatory LWOP for 18-year-old offenders violates Const 1963, art 1, § 16.[12]

[12] I find it a bit eyebrow-raising that *Monschke* used neither test. Additionally, I believe Justice Owens makes compelling points in her dissent in *Monschke*. Though I consider the critique more thoroughly later in this opinion, most pertinent is that the court failed to respect the legislature's role. See, e.g., *Monschke*, 197 Wash 2d at 341 (Owens, J., dissenting) ("[T]he lead opinion improperly strips the legislature's role in defining the age of majority and replaces it with a handful of scientific

In any case, the existence of one opinion by one sister state's supreme court hardly sheds much light on whether the third factor—penalties imposed for the same offense in other jurisdictions—weighs in favor of finding the penalty here unconstitutional. That 17 other states and the federal government also have mandatory LWOP for 18-year-old offenders shows quite the opposite.

4. WHETHER THE PENALTY ADVANCES THE GOAL OF REHABILITATION

Finally, we consider whether the punishment helps offenders to rehabilitate. Mandatory LWOP generally does not advance the goal of rehabilitation, as defendant has little realistic chance for parole. We did remark in *Hall*, 396 Mich at 658, that "rehabilitation and release are still possible, since defendant still has available to him commutation of sentence by the Governor to a parolable offense or outright pardon." That is true, though I recognize that those are avenues of relief that are unlikely to benefit most prisoners.[13] Nevertheless, I do note that even if the sentence does not generally facilitate rehabilitation, there are other valid penological goals, such as retribution, deterrence, and incapacitation,[14] which I believe it does facilitate.

The first three factors weigh strongly in favor of the punishment's constitutionality. Though the fourth factor does not weigh in favor of the punishment's consti-

studies. The court's second guessing of the legislature is questionable as this court is inferior to the legislature in both time and resources to adequately consider the issue.").

[13] See *Carp*, 496 Mich at 521 (noting that LWOP " 'forswears altogether the rehabilitative ideal' "), quoting *Graham v Florida*, 560 US 48, 74; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

[14] See *Lorentzen*, 387 Mich at 180 (listing rehabilitation, deterrence, and incapacitation as policy factors underlying penalties).

tutionality, for the reasons stated in *Hall*, it does not weigh strongly against its constitutionality either. And to the extent that the fourth factor weighs against the punishment's constitutionality, this factor alone is insufficient to support a determination that mandatory LWOP is unconstitutional.[15] I thus conclude that mandatory LWOP for 18-year-old offenders does not violate our state Constitution. As such, defendant's sentence should stand, and *Miller*'s protections should not be extended to 18-year-old offenders.

B. THE MAJORITY'S RELIANCE ON NEUROSCIENCE DEMONSTRATES THAT ITS DECISION IS BASED IN LARGE PART ON POLICY, AND POLICY DECISIONS SHOULD BE LEFT TO THE LEGISLATURE

A striking feature of the majority opinion is its discussion of and reliance on neuroscience. Though courts must consider scientific evidence in some limited contexts,[16] the majority's reliance on scientific evidence to justify its holding is extraordinary, and it signals what I believe is the overarching flaw in the majority's analysis. That flaw is that the majority is viewing the issue at hand not only through a legal lens—which would involve the sources and methods we typically consider, such as caselaw and the rules of

[15] Indeed, if failure to advance the goal of rehabilitation alone were enough to render a punishment unconstitutional, LWOP for defendants of any age would be unconstitutional.

[16] One example of when courts must consider scientific evidence is when determining whether evidence is admissible under MRE 702. MRE 702 ("If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

statutory construction (as applied to our Constitution in this case)—but the majority is also viewing the issue through a policy lens.[17]

Our Court has long said that it is not for us to decide policy issues; those questions should be left to the Legislature.[18] In 1860, our Court noted that "[t]he

[17] The majority contends that *Miller* also looked at scientific evidence. However, that is not enough reason to make me abandon my critique of how the majority interprets our Constitution. See notes 6 and 8 of this opinion.

[18] *People v Collins*, 3 Mich 343, 348 (1854) (opinion of GREEN, P.J.) ("The Legislature may have acted very unwisely, and departed in our opinion, very widely from that line of policy which the interest of the State demands; yet if they have acted within the scope of the powers conferred upon them by the Constitution, this tribunal has no authority to nullify their acts, or to restrain the free exercise of their legislative discretion."); *id*. at 398 (opinion of PRATT, J.) ("As to the policy and expediency of a statute, Courts have nothing to do[.]"); *People ex rel Whipple v Auditor General*, 5 Mich 193, 200-201, 203 (1858) ("But any question of mere policy can throw but little light on the proper construction of this Constitution. It must be construed by its language and the changes made by it in our then existing system. All other guides must be uncertain."); *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy."); *French v Ingham Co*, 342 Mich 690, 700; 71 NW2d 244 (1955) ("It is well settled that a court is without authority to pass on the wisdom, policy, or equity of a statute."); *Lansing v Lansing Twp*, 356 Mich 641, 648; 97 NW2d 804 (1959) ("The mere fact a statute appears impolitic or unwise is not sufficient for judicial construction but is a matter for the legislature."); *People v McIntire*, 461 Mich 147, 158; 599 NW2d 102 (1999) ("Thus, while the [Court of Appeals] majority makes compelling arguments that support a rational, but different, policy choice . . . , the object of judicial statutory construction is not to determine whether there are valid *alternative* policy choices that the Legislature may or should have chosen, but to determine from the text of the statute the policy choice the Legislature *actually* made.") (quotation marks and citation omitted; alteration in original); *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004) ("We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute

expediency or policy of the statute has nothing to do with its constitutionality[.]" *Tyler v People*, 8 Mich 320, 333 (1860). More recently, in *People v Harris*, 499 Mich 332, 356, 358; 885 NW2d 832 (2016), we reiterated:

> [O]ur statutory analysis is controlled by principles of interpretation, not palatability of outcomes. It is not our role to rewrite the law or substitute our own policy judgment in the face of the text of the statute . . . .
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> [I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. Instead, the correction must

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over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature."), superseded by statute on other grounds, as stated in *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349 (2018); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589; 702 NW2d 539 (2005) ("The majority believes that policy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary."); *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) ("This Court only has the constitutional authority to exercise the 'judicial power.' '[O]ur judicial role "precludes imposing different policy choices than those selected by the Legislature . . . ." ' 'Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts . . . have no concern.' ") (citations omitted); *People v Harris*, 499 Mich 332, 345; 885 NW2d 832 (2016) ("Our role as members of the judiciary is not to second-guess those policy decisions or to change the words of a statute in order to reach a different result."); *People v Betts*, 507 Mich 527, 565; 968 NW2d 497 (2021) ("We decline to encroach on the Legislature's plenary authority to create law or on its role in shaping and articulating policy by choosing among the plethora of possibilities."). See also 5 Smith & Philbin, Michigan Civil Jurisprudence (April 2022 update), Constitutional Law, § 48 ("Legislative enactments, as they bear on a matter of public policy, are conclusive; indeed, it is fundamental that courts may not substitute their judgment for that of the legislature.") (citations omitted).

> be left to the people and the tools of democracy: the ballot box, initiative, referendum, or constitutional amendment.
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> [*Id*. (second alteration by the *Harris* Court), quoting *People v McIntire*, 461 Mich 147, 159; 599 NW2d 102 (1999).]

I wholeheartedly believe that to be true. We must not strike down a statute because we disagree with the Legislature's policy choice. Indeed, leaving policy to the legislative branch is a mainstay of the country's jurisprudence, not just that of our Court. Several of the leading national treatises contain the same instruction that courts should refrain from policymaking.[19]

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[19] See, e.g., 16 CJS (May 2022 update), Constitutional Law, § 426 ("It is for the legislature to determine the justice, wisdom, necessity, desirability, or expediency of a law which is within its powers to enact, and such questions are not open to inquiry by the courts. It is not the province of a court to question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination. It is the court's province to determine only the applicability, legality, and constitutionality of a statute. When searching for legislative intent, a court's duty is simply to construe the legislative will as the court finds it, without regard to the court's own views as to the wisdom or justice of the statute.") (citations omitted); 16A Am Jur 2d (May 2022 update), Constitutional Law, § 184 ("[A]ll questions of policy, including changes in policy, are for the determination of the legislature and not for the courts. If Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them; the Supreme Court should not legislate for them. When reviewing for constitutional unreasonableness, the judiciary must give great deference to legislative action and should not substitute its own public policy judgments for that of the enacting body. In short, public policy is not a basis for declaring a statute unconstitutional.") (citations omitted); 16A Am Jur 2d (May 2022 update), Constitutional Law, § 281 ("A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is the ultimate arbiter of public policy. Thus, the determination of public policy lies almost exclusively with the legislature, and courts will not interfere with that determination in the absence of palpable errors. A court must interpret and apply statutes in the manner in which they are written

The principle that courts should leave policy decisions to the legislative branch is based in separation-of-powers concerns. See Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. *No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution*.") (emphasis added). Under that doctrine, the judiciary should not take on a legislative role by engaging in policymaking.[20] Additionally, the Legislature is, as a practical matter, better able to weigh policy concerns.[21] It is the more democratic institution that better reflects the will of the voters.[22] It is better able to consider scientific evidence

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and cannot rewrite them to comport with the court's notions of orderliness and public policy.") (citations omitted). See also *Miller*, 567 US at 493 (Roberts, C.J., dissenting) ("Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions.").

[20] See *Kyser v Kasson Twp*, 486 Mich 514, 536; 786 NW2d 543 (2010) ("[P]olicy-making is at the core of the legislative function.").

[21] *Devillers*, 473 Mich at 589 ("The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice."); *People v Steanhouse*, 500 Mich 453, 483-484; 902 NW2d 327 (2017) (LARSEN, J., concurring) (stating that the Legislature "is certainly better equipped than this Court to weigh the policy options").

[22] See *Miller*, 567 US at 515 (Alito, J., dissenting) ("When a legislature prescribes that a category of killers must be sentenced to life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.").

and weigh competing interests.[23] Unlike the Legislature, the judiciary resolves disputes between parties. That function does not easily translate to evaluating the strength of scientific claims.[24] Despite the decades of legal experience the justices on this Court have, I do not believe we are well-suited for this foray into neuroscience.

I understand that it is the Court's responsibility to judge whether penalties violate our Constitution's "cruel or unusual punishment" clause and that, in the abstract, doing so and striking down a penalty as unconstitutional does not necessarily mean that the Court is impermissibly treading into the policy realm. The majority, of course, does not simply say that it finds mandatory LWOP for 18-year-old offenders unsavory and unscientific, but rather applies the relevant factors from *Lorentzen* and *Bullock*. For the reasons outlined in this opinion, I strongly disagree with how the majority applies those factors, especially the majority's overreliance on neuroscience. As a result, I view the majority's decision as replacing a constitutional

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[23] See *Henry v Dow Chem Co*, 473 Mich 63, 92 n 24; 701 NW2d 684 (2005) (" '[Legislatures] can gather facts from a wide range of sources to help lawmakers decide whether the law should be changed and, if so, what sorts of changes should be made.' "), quoting Schwartz & Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 Conn L Rev 1215, 1219 (2001); *Henry*, 473 Mich at 91 (explaining that balancing competing interests is "a task more appropriate for the legislative branch than the judiciary").

[24] *Betts*, 507 Mich at 584 (VIVIANO, J., concurring in part and dissenting in part) ("Given the nature of our role of adjudicating individual disputes and the consequent institutional limitations this role entails, we must exercise 'humility about the capacity of judges to evaluate the soundness of scientific and economic claims[.]' Barrett, *Countering the Majoritarian Difficulty*, 32 Const Comment 61, 74 (2017) (reviewing Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (New York: HarperCollins, 2016)).") (alteration in original).

penalty with a penalty that the majority believes is better policy. This not only usurps the Legislature's role but also overrides the policy choice of the framers, whose Constitution, I believe, would permit the instant penalty. Justice THOMAS M. COOLEY warned against this kind of judicial overreach:

> What is right, what is expedient, what is proper, what constitute the inalienable rights of individuals, and what is necessary to be inserted in their constitution of government to protect them, the people who frame it must judge, and not generally he who, under it, is vested with executive or judicial functions. [Cooley, *Preface: With Some Considerations Regarding the Study of the Law*, in 1 Blackstone, Commentaries on the Laws of England, x (Chicago: Callaghan & Cockcroft, 1871).]

Moreover, insofar as the majority's holding is a policy decision, it is one for which there is no clear limiting principle. I would not be surprised if the Court extends its current line in the near future. The science defendant offers indicates that there is significant neurological development until age 25, and while the majority acknowledges this science, the majority today extends *Miller*'s and *Montgomery*'s holdings only to offenders who are 18 years old. I assume that in the coming years we will hear cases arguing that we should extend *Miller*'s protection to those in their early twenties as well. Relatedly, if mandatory LWOP is unconstitutional for 18-year-olds guilty of first-degree murder, surely it would be unconstitutional for 18-year-olds guilty of other offenses as well. And as our understanding of neurological development continues to evolve in the future, must we reevaluate the line between youth and adulthood every few years? Should we begin to consider any other factors that might affect adult brain function? Young adults are, after all, not the only ones subject to factors that cloud their

reasoning—indeed, we are all subject to cognitive biases to different extents.[25] Other groups, such as older adults, may also have neurological factors that impair their decision-making.[26]

It is up to the Legislature to balance the science with society's penological goals, i.e., "rehabilitation of the individual offender, society's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society." *Lorentzen*, 387 Mich at 180. But I fear that the majority's opinion is the first step in making it the Court's ongoing task to reconcile the Legislature's sentencing scheme with every jot and tittle of new scientific evidence. While it's understandable to want our law to be in line with the most recent scientific understanding, I believe it is also important for the court system and society to have stability. That stability is now thrown into question, as we face a future of frequently changing constitutional lines.

III. CONCLUSION

I take no issue with the scientific propositions that defendant raises. However, evaluating that scientific evidence is a task I believe is outside this Court's wheelhouse. Rather than playing amateur scientists, I

[25] See, e.g., Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

[26] See, e.g., Strough & Bruine de Bruin, *Decision Making Across Adulthood*, 2 Ann Rev Developmental Psychol 345, 357 (2020) ("Age-related declines in fluid reasoning ability and working memory can compromise the quality of older adults' decision making when decisions are complex.") (citation omitted), available at <https://www.researchgate.net/profile/Jonell-Strough/publication/346126073_Decision_Making_Across_Adulthood/links/6025da9aa6fdcc37a81d5a31/Decision-Making-Across-Adulthood.pdf?_sg%B0%5D=started_experiment_milestone&origin=journalDetail> (accessed July 18, 2022) [https://perma.cc/C3T9-B4EY].

believe that the judiciary should focus on interpreting and applying the law. Applying the relevant law here, I do not believe that the factors from *Lorentzen* and *Bullock* weigh against the constitutionality of mandatory LWOP for 18-year-old offenders. As such, I believe that we should respect the Legislature's constitutional choice of penalty rather than impose our own.

ZAHRA and VIVIANO, JJ., concurred with CLEMENT, J.

PEOPLE v STOVALL

Docket No. 162425. Argued March 2, 2022 (Calendar No. 3). Decided July 28, 2022.

In 1992, Montez Stovall pleaded guilty in the Wayne Circuit Court to second-degree murder, MCL 750.317, and to possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant fatally shot two men in 1991 when he was a juvenile, and he pleaded guilty in exchange for the dismissal of first-degree murder charges. Pursuant to the plea agreement, defendant was sentenced to life in prison with the possibility of parole (parolable life) for murder, to be served consecutively to the mandatory two-year sentence for felony-firearm. Defendant moved to withdraw his plea in 1993, but the trial court denied the motion. Defendant later filed multiple motions for relief from judgment, which were also denied. In 2017, defendant again moved for relief from the judgment, arguing that his plea was illusory and that his sentences violated the Eighth Amendment of the United States Constitution pursuant to *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016), because his sentences effectively denied him a meaningful opportunity for release. The trial court, Kelly Ramsey, J., denied the motion, and the Court of Appeals denied leave to appeal. Defendant sought leave to appeal in the Supreme Court, which remanded the case to the Court of Appeals as on leave granted. 504 Mich 892 (2019). On remand, the Court of Appeals, SAWYER and METER, JJ. (GLEICHER, P.J., dissenting), affirmed the decision of the trial court. 334 Mich App 553 (2020). Defendant again sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 507 Mich 938 (2021).

In an opinion by Chief Justice MCCORMACK, joined by Justices BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court *held*:

A sentence of life in prison with the possibility of parole for a defendant who committed second-degree murder while a juvenile constitutes cruel or unusual punishment and therefore violates Const 1963, art 1, § 16.

1. Defendant's successive motion for relief from judgment was not barred by MCR 6.502(G)(2) because it was based on a

retroactive change in law. A retroactive change in the law must serve only as a foundation or base for a defendant's claim to overcome the procedural bar in the court rule. A narrower reading of the rule requiring that the defendant's claims fall squarely within a retroactive change in law would effectively merge the procedural hurdle in MCR 6.502(G)(2) with the merits inquiry in MCR 6.508(D), rendering one of those provisions nugatory. Because *Miller* and *Montgomery* served as the foundation or base for defendant's challenges to the constitutionality of his sentences, his motion was based on a retroactive change in law sufficient to overcome the procedural bar in MCR 6.502(G).

2. A defendant may be entitled to withdraw a guilty plea if the plea bargain was illusory, meaning that the defendant received no benefit from the agreement. Contrary to defendant's assertion here, it was not the case that he received no benefit from the plea agreement. Without a plea agreement, defendant could nevertheless have been sentenced to life without the possibility of parole if he had been convicted of first-degree murder; he just would have been entitled to a *Miller* hearing after *Montgomery* was decided in 2016. Defendant received the benefit for which he bargained: the possibility of being paroled that a conviction of first-degree murder might not have allowed.

3. The Eighth Amendment of the United States Constitution provides that "cruel *and* unusual punishments" shall not be inflicted on criminal defendants. In *Miller*, the Court held that mandatory sentences of life without the possibility of parole violate the Eighth Amendment and that a sentencing court must have discretion to sentence a juvenile offender to a lesser sentence after considering the mitigating qualities of youth. Defendant's Eighth Amendment challenge to his sentences under *Miller* failed; under *Montgomery*, a parolable life sentence for a juvenile offender does not violate the Eighth Amendment. However, the Michigan Constitution is different from the Eighth Amendment. Const 1963, art 1, § 16 bars "cruel or unusual punishments," and the textual difference between the Eighth Amendment and Const 1963, art 1, § 16 called for a broader interpretation of the Michigan prohibition than its federal counterpart. When determining whether a sentence is cruel or unusual, the trial court relies on a test set forth by the Michigan Supreme Court in *People v Bullock*, 440 Mich 15 (1992), which assesses: (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan

compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. As applied to this case, regarding the first and second factors of the test, a parolable life sentence is the most severe penalty that can be imposed for second-degree murder, and it is particularly severe when imposed on a juvenile. The severity of the sentence was heightened by the fact that juveniles who committed second-degree murder could receive the same sentence as juveniles who committed first-degree murder with less process than the juveniles convicted of the more serious crime, because sentencing courts were not required to consider the mitigating qualities of youth before imposing sentence on a juvenile offender convicted of second-degree murder. Further, the Michigan Legislature, in enacting MCL 769.25 and MCL 769.25a, chose not to make parolable life the applicable sentence for juveniles who commit first-degree murder. Because this sentence was not on the table for the most serious crime a juvenile could commit, permitting it for a less serious offense was disproportionate and therefore cruel or unusual. Considering the third *Bullock* factor, the clear national trend was toward treating juveniles less harshly than adults and extending *Miller* beyond the context of mandatory life without the possibility of parole, with many states not allowing parolable life sentences for adult or juvenile offenders. Therefore, the third *Bullock* factor supported finding a parolable life sentence for a juvenile who committed second-degree murder to be cruel or unusual. Regarding the fourth *Bullock* factor, although a parolable life sentence may advance the penological goal of rehabilitation in theory, the question for juvenile offenders was whether such a sentence provided a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Parolable life sentences for juveniles do not advance the sentencing goal of rehabilitation because prisoners who have received this sentence are given lower priority for participation in educational and rehabilitative programming, which is especially necessary for juvenile offenders, and because a juvenile convicted of second-degree murder could receive a meaningful opportunity for release after a longer period of incarceration than the maximum sentence served by a juvenile convicted of first-degree murder. Finally, whether the Parole Board practically considered whether to grant parole to an offender serving a parolable life sentence was subject to changing executive branch policies. An offender's meaningful opportunity to gain release is to be measured in terms of the offender's demonstrated maturity and rehabilitation and should not be subject to the whims of executive branch policy. Under the test in

Bullock, a parolable life sentence for a defendant who committed second-degree murder as a juvenile violated Const 1963, art 1, § 16.

Sentence for second-degree murder conviction vacated and case remanded to the Wayne Circuit Court for further proceedings.

Chief Justice MCCORMACK, concurring, wrote separately to address Justice ZAHRA's suggestion that the Supreme Court should revisit its caselaw interpreting Const 1963, art 1, § 16. The Supreme Court has long held that the textual difference between the federal and state constitutional provisions means that Article 1, § 16 provides slightly broader protection than the Eighth Amendment. Justice ZAHRA would hold that Article 1, § 16 only prohibited punishments that would have been considered cruel or unusual in 1963. In fact, it was likely that the original meaning of the prohibition in Article 1, § 16 was to consider standards of decency over time. Additionally, the United States Supreme Court had already implemented its "evolving standards of decency" approach to interpreting the Eighth Amendment when the state Constitution was ratified, so the fact that the ratifiers used the same words as the Eighth Amendment in Article 1, § 16 but with a more flexible conjunction indicated that they did not intend to reject the approach of the United States Supreme Court. Further, the assumption that, by trying to understand the text's original meaning, judges could set aside their own policy preferences was flawed. "Original" understandings of constitutional provisions were subject to differing interpretations, and allowing judges to reconsider long-settled precedent in order to consider the original meanings of constitutional provisions would render stare decisis irrelevant.

Justice ZAHRA, dissenting, joined by Justice VIVIANO (except as to footnote 9) and Justice CLEMENT (except as to footnotes 24 and 25), agreed with the majority that defendant's plea and sentencing agreements were not illusory or invalid and that defendant had entered into them knowingly, voluntarily, and intelligently. However, he disagreed that defendant's parolable life sentences constituted cruel or unusual punishment under Const 1963, art 1, § 16. In *Montgomery*, the Supreme Court explicitly approved of parolable life sentences for juvenile homicide offenders as a remedy for the mandatory life sentences held unconstitutional under *Miller*. *Miller* mandated only that the sentencing court consider an offender's youth and attendant characteristics before imposing life without the possibility of parole. Because defendant did not receive life without the possibility of parole, his Eighth

Amendment challenge lacked merit. Justice ZAHRA further asserted that the Michigan Constitution did not support defendant's claim that his sentences were constitutionally disproportionate pursuant to the test set forth by the Michigan Supreme Court in *People v Lorentzen*, 387 Mich 167 (1992), and *Bullock*. First, the severity of a parolable life sentence was proportionate to the gravity of a second-degree murder conviction. Second-degree murder was the second-most serious crime a person could commit under Michigan law, so it was logical that it was punishable by the second-most serious punishment, a parolable life sentence. With regard to the second factor, parolable life was not an uncommon sentence for serious crimes committed in Michigan, and Michigan law penalized some nonhomicide offenses with parolable life sentences, demonstrating that this punishment was not constitutionally disproportionate for homicides. Third, parolable life sentences were common in other states, and the majority opinion inappropriately relied on the law in jurisdictions that extended *Miller* to de facto life sentences, which was not what was at issue here. Fourth, defendant's sentences served the penological goal of rehabilitation because he was eligible for parole after 10 years and able to be reconsidered for parole every five years after that. Therefore, none of the factors in the *Lorentzen/Bullock* test supported the conclusion that a parolable life sentence was constitutionally disproportionate when imposed on a juvenile homicide offender, so defendant did not show that his sentence violated the Eighth Amendment or Const 1963, art 1, § 16. The majority opinion's application of the *Lorentzen/Bullock* factors was flawed in several respects. First, the majority conflated sentences of parolable life with nonparolable life sentences and rendered the distinction made between the two sentences by the *Montgomery* Court meaningless. Next, the majority improperly second-guessed the Legislature's policy decisions by using the Legislature's chosen *Miller* remedy, MCL 769.25 and MCL 769.25a, as a justification for finding parolable life sentences constitutionally disproportionate. Further, the facts of defendant's case demonstrate why his parolable life sentences are not more severe than the term-of-years sentences imposed under MCL 769.25 and MCL 769.25a. Finally, the majority based its contention that parolable life sentences for juvenile homicide offenders do not advance the penological goal of rehabilitation on its assertion that those sentenced to parolable life had less access to rehabilitative programming than those serving term-of-years sentences and on its assertion that the decision to grant parole is subject to the changing policies of the Parole Board. But the Parole Board was now required to consider the distinctive attri-

butes of youth recognized in *Miller*, and the Board's policy directives required it to give prisoners who were denied parole a notice of decision setting forth the factors the Board considered and the corrective actions the prisoner could take to improve the probability of being granted parole in the future. Therefore, those sentenced to parolable life had the tools necessary to maximize their prospects for release. *Miller* applied only to life-without-parole sentences and required only a meaningful opportunity to obtain release. Because *Montgomery* concluded that parolable life sentences provided this meaningful opportunity, Justice ZAHRA would not have entertained defendant's request to redefine what constituted a meaningful opportunity. In this case and the other sentencing cases decided at the same time, the majority departed from the Court's past jurisprudence and improperly usurped the role of the Legislature.

Justice VIVIANO, dissenting, joined Justice ZAHRA's dissent except as to footnote 9. Justice VIVIANO disagreed with the majority and with Justice ZAHRA's statement in footnote 9 that defendant had satisfied the procedural requirements to file a successive motion for relief from judgment under MCR 6.502(G). The majority held that defendant's motion satisfied the procedural bar in MCR 6.502(G) because it was "based on a retroactive change in law." But defendant relied on *Miller* and *Montgomery*, both of which are inapplicable to defendants sentenced to life with the possibility of parole. Reliance on an inapplicable holding was not a true basis or foundation to satisfy the court rule, and the majority's holding would allow defendants to satisfy the procedural requirements by citing a case with retroactive effect, regardless of whether the cited caselaw actually entitled them to any relief. The relief requested by defendant in his motion did not depend on recognition of the rule announced in *Miller* and made retroactive in *Montgomery*, and the majority's interpretation of MCR 6.502(G) would incentivize criminal defendants to file increasingly meritless successive motions for relief from judgment, which would further burden already backlogged trial courts. Additionally, even if defendant could overcome the procedural bar in the court rule, his constitutional argument would nevertheless fail for the reasons stated by Justice ZAHRA.

Justice CLEMENT, dissenting, joined Justice ZAHRA's dissent except as to footnotes 24 and 25 and except insofar as Justice ZAHRA's dissent conflicted with her opinion in *People v Boykin*, 510 Mich 171; 987 NW2d 58 (2022) (CLEMENT, J., concurring in part and dissenting in part).

CONSTITUTIONAL LAW — CRUEL OR UNUSUAL PUNISHMENT — SENTENCING — JUVENILE OFFENDERS — SECOND-DEGREE MURDER — PAROLABLE LIFE SENTENCES.

The prohibition against "cruel or unusual punishment" in Const 1963, art 1, § 16 bars courts from sentencing juvenile offenders convicted of second-degree murder to a parolable life sentence.

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State Appellate Defender (by *Sofia V. Nelson* and *Adrienne N. Young*) for defendant.

Amicus Curiae:

Tessa B. Bialek for the Quinnipiac University School of Law Juvenile Sentencing Project.

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Marsha L. Levick for the Juvenile Law Center.

John C. Shearrod El *in propria persona*.

Carlton West II *in propria persona*.

Arthur L. Jones *in propria persona*.

Michael S. Perkins *in propria persona*.

Michael Johnson *in propria persona*.

MCCORMACK, C.J. We consider whether the defendant's life sentence with the possibility of parole for second-degree murder, imposed for a crime committed when he was a juvenile, violates Article 1, § 16 of the

Michigan Constitution. That provision, unlike its federal counterpart, forbids cruel *or* unusual punishment, and our test from *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972), and *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992), governs our review. Applying that test, we conclude that the defendant's sentence violates the prohibition against cruel or unusual punishment in Const 1963, art 1, § 16, so we reverse the Court of Appeals, vacate the defendant's sentence, and remand to the Wayne Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

In 1991, while he was a juvenile, the defendant fatally shot two men. He pled guilty in 1992 in two separate files to one count each of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in exchange for the dismissal of first-degree murder charges. The plea deal also included a sentence agreement for life in prison with the possibility of parole (parolable life) for murder, consecutive to the mandatory two-year term for felony-firearm. In 1993, the defendant moved to withdraw his plea. The trial court denied that motion. The Court of Appeals affirmed, and this Court denied leave to appeal in 1994. Defendant subsequently filed multiple motions for relief from judgment, none of which succeeded.

The defendant filed this successive motion for relief from judgment in 2017, arguing that his plea was illusory and his sentences violate the Eighth Amendment of the United States Constitution under *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016), because he is

effectively being denied a meaningful opportunity for release. The trial court denied the motion, concluding that despite the fact that the Parole Board is following stricter procedures than when the defendant entered into his plea, he still has a chance to be released, and his plea was not illusory. The Court of Appeals denied leave to appeal.

The defendant appealed here, and this Court remanded the case to the Court of Appeals as on leave granted. *People v Stovall*, 504 Mich 892 (2019). On remand, a majority of the Court of Appeals affirmed the decision of the trial court in a published opinion. *People v Stovall*, 334 Mich App 553; 965 NW2d 264 (2020). Judge GLEICHER dissented and would have remanded for a resentencing hearing consistent with *Miller* because she concluded that the defendant is serving a de facto sentence of life without the possibility of parole (LWOP) with no individualized consideration of the characteristics of youth. *Id*. at 572-580 (GLEICHER, P.J., dissenting).

The defendant again appealed here, repeating his same arguments. We granted leave to appeal and directed the parties to address

> (1) whether the defendant's parolable life sentences for second-degree murder were the result of an illusory plea bargain; (2) whether the defendant's sentences violate the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution, and/or the prohibition against "cruel or unusual punishment" found in Const 1963, art 1, § 16, where he was under the age of 18 at the time of the offenses; (3) whether the Parole Board's "life means life" policy renders the defendant's sentences unconstitutional under *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016); (4) whether, pursuant to *Miller* and *Montgomery*, the trial court was

> required to take the defendant's youth into consideration when accepting his plea and ruling on his motion for relief from judgment; and (5) whether the Parole Board is similarly required to take his youth into consideration when evaluating him for release on parole.

People v Stovall, 507 Mich 938 (2021). In light of our rulings below, we decline to address issues (3), (4), and (5) from our grant order.

II. PROCEDURAL BAR IN MCR 6.502(G)

The prosecution argues that the defendant's successive motion for relief from judgment is barred by MCR 6.502(G) because the defendant's motion is not "based on a retroactive change in law." See MCR 6.502(G)(2). We disagree; as Justice CLEMENT said in her concurring statement in *People v Manning*, 506 Mich 1033, 1038 (2020) (CLEMENT, J., concurring), the retroactive change in law must only serve as a "foundation" or "base" for a defendant's claim to overcome the procedural bar in MCR 6.502(G)(2). Reading the rule more narrowly to require that the defendant's claims fall squarely within a retroactive change in law would effectively merge the procedural hurdle in MCR 6.502(G)(2) with the merits inquiry in MCR 6.508(D), rendering one of those provisions nugatory. *Manning*, 506 Mich at 1039 (CLEMENT, J., concurring), quoting *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) ("[N]o word should be treated as surplusage or made nugatory.").

Because *Miller* and *Montgomery* serve as the "foundation" or "base" for the defendant's challenges to the constitutionality of his sentences, his motion is "based

on a retroactive change in law" and therefore overcomes the procedural bar in MCR 6.502(G).[1]

III. ANALYSIS

A. ILLUSORY PLEA

The defendant first asserts that his plea was illusory because he believed that pleading guilty to second-degree murder was the only way to avoid spending his life in prison, but under *Miller* and *Montgomery*, mandatory LWOP was outside the power of the state to impose. "A defendant may be entitled to withdraw a guilty plea if the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement." *People v Harris*, 224 Mich App 130, 132; 568 NW2d 149 (1997).

We disagree with the defendant that he received no benefit from his plea agreement. As the prosecution notes, the defendant could have still been sentenced to LWOP had he been convicted of first-degree murder; he just would have been entitled to a *Miller* hearing in 2016, after *Montgomery* was decided. So the defendant still received the benefit for which he bargained: the possibility of being paroled that a first-degree murder conviction might not have allowed. Thus, it is not the case that "the defendant received no benefit from the agreement." *Harris*, 224 Mich App at 132.[2]

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[1] The defendant also argues that his motion involves a "claim of new evidence that was not discovered before the first such motion [for relief from judgment]," satisfying the other exception to the procedural bar in MCR 6.502(G). See MCR 6.502(G)(2). Given our conclusion that the defendant's motion is "based on a retroactive change in law," we decline to address this argument.

[2] Defendant's citation of *People v Bollinger*, 224 Mich App 491, 493; 569 NW2d 646 (1997), is nominally on point but ultimately distinguishable. In *Bollinger*, the defendant pled guilty to avoid a habitual-offender

B. CONSTITUTIONALITY OF PAROLABLE LIFE SENTENCE

Whether a defendant's sentence constitutes cruel and/or unusual punishment under the Eighth Amendment of the United States Constitution or Article 1, § 16 of the Michigan Constitution are questions of constitutional law that we review de novo. *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015). That means that we review them independently, with no required deference to the trial court. *People v Beck*, 504 Mich 605, 618; 939 NW2d 213 (2019).

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII. In *Miller*, the United States Supreme Court held that mandatory LWOP sentences for juveniles violate the Eighth Amendment. Rather, a sentencer must have discretion to impose a lesser sentence on a juvenile after considering "the mitigating qualities of youth." *Miller*, 567 US at 476, quoting *Johnson v Texas*, 509 US 350, 367; 113 S Ct 2658; 125 L Ed 2d 290 (1993). The Court noted "three significant gaps between juveniles and adults": (1) Children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and risk-taking; (2) children are more vulnerable to negative influences and outside pressures from their family and

enhancement that the state lacked any authority to enforce. *Id*. at 491-492. Thus, in both that case and this one, the defendant pled guilty to avoid a penalty that the prosecutor did not have the authority to pursue. But in *Bollinger*, the prosecutor agreed as part of the plea agreement to forgo prosecuting the defendant as a habitual offender, but it lacked any authority to do so because its habitual-offender notice was not timely filed. *Id*. at 492-493. Here, the prosecutor could have still sought a first-degree murder conviction and LWOP even if the defendant had been prosecuted after *Miller*; LWOP simply would not have been mandatory.

peers, have limited control over their own environment, and lack the ability to extricate themselves from horrific, crime-producing settings; and (3) a child's traits are less fixed than those of an adult, and a child's actions thus are less likely to be evidence of irretrievable depravity. *Miller*, 567 US at 471.

In *Montgomery*, the Court held that *Miller* announced a substantive rule of constitutional law; therefore, it applied retroactively to cases on collateral review.

Defendant's challenge to his parolable life sentence under the Eighth Amendment fails—*Montgomery* tells us so explicitly. See *Montgomery*, 577 US at 212 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."). The United States Supreme Court wouldn't offer up a *Miller* remedy that it believed violated the Eighth Amendment. And if there were any doubt, *Jones v Mississippi*, 593 US ___; 141 S Ct 1307; 209 L Ed 2d 390 (2021) eliminated it. See *id*. at ___; 141 S Ct at 1314 (rejecting the argument that "*Miller* requires more than just a discretionary sentencing procedure"); *id*. at ___; 141 S Ct at 1321 ("*Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18.").

The Michigan Constitution, however, is different. Article 1, § 16 of the Michigan Constitution provides that "[e]xcessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." The Michigan Constitution, therefore, forbids unusually excessive imprisonment. *Lorentzen*, 387 Mich at 172. In *Bullock*, 440 Mich at 30-35, this Court held that the textual difference

between Michigan's prohibition on "cruel *or* unusual punishment" and the Eighth Amendment's bar on "cruel *and* unusual punishments," the historical circumstances when the Eighth Amendment was ratified, and longstanding Michigan precedent called for a broader interpretation of Michigan's prohibition against "cruel or unusual punishment" than the Supreme Court's interpretation of the federal counterpart.

The Court applied a four-part test adopted in *Lorentzen*, 387 Mich 167, for determining whether a sentence is cruel or unusual. *Bullock*, 440 Mich at 33-34. That test assesses (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. *Bullock*, 440 Mich at 33-34, citing *Lorentzen*, 387 Mich at 176-181. That test also governs whether the defendant's parolable life sentence violates Const 1963, art 1, § 16.

As for the first and second *Bullock* factors (which go hand in hand here), a parolable life sentence is the most severe penalty that can be imposed for second-degree murder.[3] MCL 750.317. And it is particularly

[3] A trial court could impose a long term-of-years sentence that would theoretically deprive a defendant of *any* chance of being paroled during their lifetime. But such a defendant, unlike a parolable lifer, would have an early release date and therefore be given higher priority for scarce rehabilitative and educational programming. See generally *In re Parole of Elias*, 294 Mich App 507, 530-531; 811 NW2d 541 (2011) (describing how a prisoner's participation in programming is considered in the parole guidelines); see also *People v Johnson*, unpublished per curiam

severe when imposed on a juvenile, given the important mitigating ways that children are different from adults. While second-degree murder is a grave offense, the law recognizes graver yet.

The severity of the sentence is also heightened by the fact that unlike courts sentencing juveniles who commit first-degree murder, sentencing courts who sentenced defendants like Mr. Stovall—those convicted of second-degree murder committed while they were juveniles—have not been required to consider the mitigating qualities of youth identified in *Miller* before imposing sentence. But see *People v Boykin*, 510 Mich 171, 189; 987 NW2d 58 (2022) (courts sentencing juveniles who commit murder must consider the mitigating characteristics of youth when exercising their discretion to impose *any* sentence). In other words, while juveniles who commit

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opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344322), pp 8-9 ("[P]arolable lifers do not get the benefit of the parole guidelines until after an interview with a member of the parole board, after the sentencing judge or the judge's successor has had an opportunity to register any objections, and after a public hearing of the type contemplated for prisoners seeking pardon or commutation."). The defendant asserts, and the prosecution does not dispute, that his parole guidelines have never been scored.

Other considerations also make a term-of-years sentence less harsh than a life sentence. For example, a prisoner subject to a term-of-years sentence is generally considered for parole at no more than two-year intervals, but a parolable lifer is reviewed only at five-year intervals after serving 15 years of their sentence. Compare Michigan Department of Corrections, *Parole Process*, PD 06.05.104 (April 1, 2022), p 5, ¶ AA (providing for parole review "at intervals not to exceed 24 months" except in limited circumstances), available at <https://www.michigan.gov/documents/corrections/PD040122_06_05_104_750614_7.pdf> [https://perma.cc/T345-7QLN], with MCL 791.234(8)(b) (providing that a prisoner sentenced to imprisonment for life is reviewed for parole after serving 15 years of their sentence "and every 5 years thereafter"). We express no opinion on whether a long term-of-years sentence imposed on a juvenile would violate Const 1963, art 1, § 16.

first-degree murder will always receive a significant procedural safeguard before being sentenced to die in prison, see *People v Taylor*, 510 Mich 112, 126; 987 NW2d 132 (2022), defendants like Mr. Stovall who commit second-degree murder as juveniles are at risk to serve precisely the same sentence without that safeguard.[4] That is, they may receive the same sentence with less process although they have been convicted of a *less* serious offense.

As a practical matter, a parolable life sentence for second-degree murder is often *more* severe than the minimum sentences now given to most juveniles who commit *first-degree* murder: 25 to 40 years. In enacting MCL 769.25 and MCL 769.25a, the Legislature chose not to make a parolable life sentence the applicable sentence for juveniles who commit first-degree murder, even though the United States Supreme Court blessed parolable life as a constitutionally permissible means of accommodating its decision in *Miller*. See, e.g., *Miller*, 567 US at 489; *Montgomery*, 577 US at 212. When a sentence is not on the table for the most serious offense a juvenile can commit, see *People v Carp*, 496 Mich 440, 514; 852 NW2d 801 (2014)

[4] This failure is not mitigated by the Parole Board's recent adoption of provisions requiring the board to consider the mitigating characteristics of youth, i.e., the *Miller* factors, when considering a defendant for parole. See PD 06.05.104, p 3, ¶ N. While the Parole Board's consideration of these mitigating characteristics is certainly in harmony with recent advances in the way we understand how youth impacts behavior and culpability, *Miller* requires that *sentencing courts* consider the mitigating characteristics of youth before imposing a discretionary sentence on juveniles who would otherwise be subject to a mandatory LWOP sentence. Having the *Parole Board* consider those characteristics decades later in deciding whether to grant parole to the defendant is a doubly watered-down version of what *Miller* requires and is no substitute for the judiciary's responsibility to ensure that sentences are constitutionally proportionate when they are imposed.

("[F]irst-degree murder is almost certainly the gravest and most serious offense that an individual can commit under the laws of Michigan[.]"), cert gtd and opinion vacated sub nom on other grounds *Carp v Michigan*, 577 US 1186 (2016), permitting it for a less serious offense is disproportionate and therefore cruel or unusual.

Comparing the maximum penalty that the Legislature allows to be imposed against a juvenile convicted of first-degree murder to the maximum penalty it allows to be imposed against a juvenile convicted of second-degree murder is also instructive. See, e.g., *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003) (explaining that the Legislature roots both minimum and maximum sentences in the principle of proportionality). Without the safeguards of (1) the prosecution timely moving the trial court to sentence a juvenile convicted of first-degree murder to LWOP; (2) the trial court conducting a hearing focused on the *Miller* factors; and (3) the trial court determining that the particular offender deserves LWOP, the maximum release date for a juvenile convicted of first-degree murder is typically 60 years. See MCL 769.25(4) or (9); MCL 769.25a(4)(c).

A hypothetical shows how this works. Consider Defendant A, who commits murder as a juvenile, is arrested on his seventeenth birthday, and is detained until he is ultimately convicted of *first-degree murder* and sentenced to a term-of-years sentence under MCL 769.25(4) or (9). Under the statute, which imposes a 60-year maximum for first-degree murder, on Defendant A's 77th birthday, he reaches his maximum discharge date and must be released from the Depart-

ment of Corrections; the Parole Board has no discretion to keep Defendant A incarcerated even one more day.

Now consider Defendant B, who also commits murder as a juvenile, is arrested on his seventeenth birthday, is detained until he is instead convicted of *second-degree murder* and sentenced to parolable life, and who is not paroled during the first 60 years of his sentence. On Defendant B's 77th birthday, unlike Defendant A, there is no guarantee that he will be released from the custody of the Department of Corrections. The same is true the next year. And the next.

In short, in enacting MCL 769.25 and MCL 769.25a, the Legislature decided that the Parole Board has a limited window of authority for deciding when a juvenile convicted of the most serious crimes may be released. For many such offenders, the Parole Board's authority extends only to their sixtieth year of incarceration. That the Parole Board's authority over juvenile offenders convicted of lesser offenses extends further into their term of incarceration is evidence of disproportionality.

Turning to the third *Bullock* factor, there is a clear national trend toward treating juveniles less harshly than adults and extending *Miller* beyond just the mandatory LWOP context. See, e.g., *McKinley v Butler*, 809 F3d 908, 911 (CA 7, 2016); *People v Franklin*, 63 Cal 4th 261, 276; 370 P3d 1053 (2016); *Casiano v Comm'r of Correction*, 317 Conn 52; 115 A3d 1031, 1045 (2015); *People v Buffer*, 2019 IL 122327, ¶¶ 25-27; 137 NE3d 763; *State v Null*, 836 NW2d 41, 71 (Iowa, 2013); *State v Zuber*, 227 NJ 422, 429; 152 A3d 197 (2017); *State v Kelliher*, 381 NC 558; 873 SE2d 366; 2022-NCSC-77 (2022); *State v Moore*, 149 Ohio St 3d 557, 583; 2016-Ohio-8288; 76 NE3d 1127 (2016); *Davis v State*,

415 P3d 666; 2018 WY 40, ¶¶ 44-45 (2018) (all extending *Miller* to sentences that are de facto life sentences or the functional equivalent of LWOP); see also *State v Gilbert*, 193 Wash 2d 169, 175-176; 438 P3d 133 (2019) (sentencing courts must consider the mitigating characteristics of youth when sentencing all juveniles and may impose a lesser sentence on the basis of those characteristics, regardless of any sentencing statute to the contrary).

And many states authorize term-of-years sentences for second-degree murder and do not allow parolable life sentences—for *anyone*, not just juveniles.[5] See, e.g., Ariz Rev Stat Ann 13-710 (providing for a minimum of 10 years and a maximum of 29 years for second-degree murder); Ark Code Ann 5-10-103 (providing that second-degree murder is a Class A felony) and Ark Code Ann 5-4-401 (providing that the punishment for Class A felonies is a determinate sentence of 6 to 30 years); Ga Code Ann 16-5-1 (providing for a 10- to 30-year sentence for second-degree murder); Iowa Code 707.3 (providing for a 50-year maximum sentence for second-degree murder); Md Code, Crim Law 2-204 (providing for a 40-year maximum sentence for second-degree murder); Minn Stat 609.19 (same); New Mex Stat Ann 30-2-1 (providing that second-degree murder is a second-degree felony resulting in the death of a human being) and New Mex Stat Ann 31-18-15(4) (setting the punishment for second-degree felonies at 15 years in prison); Tenn Code Ann 39-13-210 (providing that second-degree murder is a Class A felony) and Tenn Code Ann 40-35-112 (providing that Class A

[5] We agree with Justice ZAHRA's dissent that "parolable life is a common sentence for juvenile offenders in other states," but that's not very relevant. The *Lorentzen/Bullock* test compares the penalty imposed for the offense in Michigan and *the penalty imposed for the same offense* in other states.

felonies are subject to sentences of 15 to 60 years); Va Code 18.2-32 (providing for a minimum sentence of five years and a maximum sentence of 40 years for second-degree murder); W Va Code 61-2-3 (providing for a 10- to 40-year sentence for second-degree murder).

Of the states that do authorize parolable life for second-degree murder, some have recognized the difference between children and adults by making children sentenced to parolable life eligible for parole sooner. Compare, e.g., Ore Rev Stat 144.397(1)(a) and (2)(a) (allowing a prisoner who commits second-degree murder while a juvenile to be eligible for parole after 15 years) with Ore Rev Stat 163.115(5)(b) (providing that prisoners who commit second-degree murder must serve a minimum of 25 years in prison before becoming eligible for parole). For these reasons, the third *Bullock* factor supports finding a parolable life sentence for a juvenile who commits second-degree murder to be cruel or unusual.

Finally, although a parolable life sentence may advance the penological goal of rehabilitation in theory, for juvenile offenders the question is whether that parolable life sentence provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Compare *Montgomery*, 577 US at 212, with *Miller*, 567 US at 479, quoting *Graham v Florida*, 560 US 48, 75; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

A lot of ground we have already covered leads us to conclude that a parolable life sentence for a juvenile offender convicted of second-degree murder does not advance this penological goal. First, prisoners who receive parolable life sentences are given lower priority when it comes to educational and rehabilitative programming. Access to these programs is vital, especially

for juvenile offenders, to enhance their growth and rehabilitative potential. See *Graham*, 560 US at 74 (explaining that "[f]or juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident") (citation omitted).

Second, the Legislature has made clear its intent that for juvenile first-degree-murder convictions, such a meaningful opportunity for release is generally available after 60 years unless the juvenile offender was afforded the procedural protection of a *Miller* hearing. It does not rationally follow that a meaningful opportunity for release for a juvenile convicted of second-degree murder could come after a longer period of incarceration than the maximum served by a juvenile convicted of first-degree murder.

Third, and relatedly, whether the Parole Board practically considers whether to grant parole to an offender serving a parolable life sentence is subject to the fluctuations of executive branch policies. An offender's meaningful opportunity to gain release is to be measured in terms of the offender's "demonstrated maturity and rehabilitation," not the whims of an executive branch policy directive instructing the Parole Board to forgo consideration of all offenders serving parolable life. *Miller*, 567 US at 479 (quotation marks and citation omitted). Without further statutory limits, such as the one referred to by the Supreme Court in *Montgomery* as a permissible sentencing scheme, parolable life does not necessarily further the sentencing goal of rehabilitation. *Montgomery*, 577 US at 212, citing Wyo Stat Ann § 6-10-301(c) (noting that the Wyoming statute, which made juvenile homicide

offenders eligible for parole after serving 25 years in prison, may be a constitutional sentencing scheme).

"[T]he people of Michigan, speaking through their constitution, have forbidden the imposition of cruel or unusual punishments, and we are duty-bound to devise a principled test by which to enforce that prohibition, and to apply that test to the cases that are brought before us." *Bullock*, 440 Mich at 41. We do that here and conclude that a parolable life sentence for a defendant who commits second-degree murder while a juvenile violates Article 1, § 16 of the Michigan Constitution. This conclusion is therefore precisely a determination of what the law requires and not, as the dissent asserts, an intrusion upon the Legislature's authority of determining what the law should be. We have done this without controversy many times before and will undoubtedly do so again. See, e.g., *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020) (unanimously holding that the defendants had committed an unconstitutional taking by retaining the surplus proceeds from the tax-foreclosure sales of the plaintiffs' properties).

IV. CONCLUSION

We vacate the defendant's sentence for second-degree murder because it violates Article 1, § 16 of the Michigan Constitution. We remand this case to the Wayne Circuit Court for further proceedings consistent with this opinion.

BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with MCCORMACK, C.J.

MCCORMACK, C.J. (*concurring*). I concur in the majority opinion that I wrote.[1] I write separately to address Justice ZAHRA's contention that our many prior decisions construing Article 1, § 16 of the Michigan Constitution, which precludes imposition of "cruel or unusual punishment," are analytically unsound and that he would therefore revisit them. He finds them unsound because he does not believe the original meaning when ratified in 1963 included "evolving standards of decency." Accepting Justice ZAHRA's premise for argument's sake that clear, unanimous original meaning is knowable, I'm not convinced that the original meaning of Article 1, § 16 doesn't include evolving standards of decency; more likely, that is exactly what the ratifiers intended. But more importantly, his premise that clear, unanimous original intent can be discerned and applied by judges with superhuman neutrality to resolve legal questions in cases like this is flawed.

To begin with our constitutional text. It contrasts with the corresponding provision in the Eighth Amendment of the United States Constitution, which prohibits "cruel *and* unusual punishment." This Court has long held that this textual difference means—not surprisingly given the plain meaning of conjunctions—that Article 1, § 16 provides slightly broader protection than the Eighth Amendment. See *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992); *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972). In those same decisions, we have also followed the United States Supreme Court's analytical approach in applying the Eighth Amendment when applying Article 1, § 16.

[1] By quirk of this Court's practice, my colleagues and I can "concur" with an opinion for which we are the author, a step I have never taken before. But here I appreciate the opportunity to dedicate a separate opinion to some fundamental observations.

That is, we have agreed that the provision "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Lorentzen*, 387 Mich at 179, quoting *Trop v Dulles*, 356 US 86, 101; 78 S Ct 590; 2 L Ed 2d 630 (1958).

Justice ZAHRA, "[n]otwithstanding" this precedent, "question[s] whether the textual difference between the two punishment clauses is a sufficient basis to conclude that the Michigan Constitution provides greater protection than the Eighth Amendment." The basis for his question is, he asserts, that "[d]iffering interpretative principles apply to each constitutional provision." For that reason, Justice ZAHRA says that this Court was wrong to follow the United States Supreme Court's approach to interpreting the Eighth Amendment's prohibition against cruel and unusual punishment in light of the evolving standards of decency. Because his "interpretive principles," which are simply a factual contention, contrast with those of the United States Supreme Court, they make Michigan's constitutional protection less than, not more than, the Eighth Amendment's. Curious.

Justice ZAHRA therefore suggests that this Court has "gone astray" in this precedent (including precedent he himself joined, see *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014)), because the ratifiers of the Michigan Constitution in 1963 might *not*—says he—have understood the prohibition against "cruel or unusual punishment" to consider society's evolving standards of decency. He thus would instead construe Article 1, § 16's prohibition against cruel or unusual punishment " 'to discern the original meaning attributed to the words of [the] constitutional provision by its ratifiers, the people, who are understood to have accepted the words employed in a constitutional provision in the

sense most obvious to the common understanding and to have ratified the instrument in the belief that that was the sense designed to be conveyed.' "[2] (Citation omitted.) So far so good.[3] But then: "while the protection afforded under the Eighth Amendment is constantly evolving, the protection afforded under Const 1963, art 1, § 16, remains as it was originally understood at the time of ratification"; that is, he suggests that it prohibits only those punishments considered cruel or unusual in 1963. This step is mere assertion. Although the ratifiers of Const 1963, art 1, § 16 adopted language nearly identical to the Eighth Amendment, they meant, according to Justice ZAHRA, something far less. But what is the evidence for that?

Justice ZAHRA simply *supposes* that the 1963 ratifiers understood the prohibition against cruel or unusual punishment to mean punishments either cruel or unusual at the time. That argument rests on the premise that all ratifiers (or a majority, maybe?) agreed

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[2] When interpreting constitutional provisions, of course this Court has often referred to the rule of "common understanding" to consider how the operative terms were generally understood at the time of ratification. See *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 373-374; 630 NW2d 297 (2001) (YOUNG, J., concurring) (collecting cases). But this has never been an exclusive tool; many of these same opinions make clear that courts may also consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished" and the desire to avoid an interpretation that creates a constitutional invalidity. See, e.g., *State Hwy Comm v Vanderkloot*, 392 Mich 159, 179; 220 NW2d 416 (1974), quoting *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971).

[3] To emphasize, I agree with Justice ZAHRA that the ratifiers' intent is at the core of the issue. The logical misstep in his argument is that it assumes the conclusion—that, in fact, the ratifiers intended to petrify then-existing conceptions of "cruel or unusual" punishment—and only those—for all time. That contention requires support, which his argument does not provide.

exactly about what the broad phrase "cruel or unusual punishment" meant in 1963 too. Given that assumption, all this Court needs to do is to look back to the precise and unanimous 1963 meaning of "cruel or unusual punishment" and, *voila*, then the modern applications will be clear.

But it does not follow that this Court's consideration of the "evolving standards of decency" when interpreting our state's constitutional prohibition on cruel or unusual punishment betrays "the original meaning attributed to the words of a constitutional provision by its ratifiers" as explained in recent decisions Justice ZAHRA cites. See *People v Vaughn*, 491 Mich 642, 651 n 25; 821 NW2d 288 (2012), and *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004). More plausibly, the original meaning expressed by those words is precisely to consider standards of decency over time. The words on their face suggest as much. And given that the 1963 ratification came after the United States Supreme Court's "evolving standards of decency" approach to the Eighth Amendment was established, the ratifiers could have picked words to make very clear that they rejected the Supreme Court's evolving-understanding approach. Instead, they went with the same words, with a more flexible conjunction tying them together.

For, unlike certain terms with more fixed and less controversial meanings, see, e.g., *State Hwy Comm*, 392 Mich at 180 ("Certainly the popular and common understanding of the word 'shall' is that it denotes mandatoriness."), the broad language "cruel or unusual punishment" itself conveys an understanding that this prohibition is to be applied in context and over time. It is far-fetched to suppose that the ratifiers of the 1963 Constitution themselves were unanimously

committed to the belief that punishments cruel or unusual were understood (by them) to be fixed in time, static for all humanity. Nor is there evidence for this Court to assume as much. The ratifiers would have naturally expected the application of the broad words "cruel or unusual" to be applied to reflect evolving conceptions of cruelty, for example, over time.[4] There is no reason to assume otherwise.

So to get where he would go, Justice ZAHRA's argument must add text to our Constitution, like ". . . as we think today." That is, Justice ZAHRA, in effect, reads the constitutional text to prohibit something like "cruel or unusual punishment as we think of those today in 1963." The ghost modifier does all the work.

But enough on the merits question. I write here mainly to address Justice ZAHRA's claim about methodology because it feels important enough to warrant transparent discussion of the stakes.

Justice ZAHRA suggests that by tacking to original meaning (as a majority of us understand it), we can keep judges' subjective policy preferences out of decision-making. That is an alluring prospect: judges setting aside their policy preferences and instead discerning the original meaning as understood by statesmen and stateswomen (usually statesmen) from generations past to guide interpretation. But this approach has three major flaws.

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[4] Moreover, generations of Michiganders should not be prisoners of history with the breadth of their constitutional protections confined only to what the 1963 ratifiers would consider "cruel or unusual." That is not the nature of constitutionalism in the first place. Constitutions often express general principles to be applied in specific cases and context over time. Otherwise, constitutional law reduces to a two-dimensional exercise in history by us non-historian judges.

First, it assumes implausibly that there is such a thing as *an* original meaning and that it is identifiable. Second, the approach assumes, perhaps more heroically, that judicial efforts to discern "the" original meaning will not be impacted at all by judges' own experiences, perspectives, and values. Finally, Justice ZAHRA's approach eviscerates stare decisis, leaving judges even more room to channel their druthers.

To take each in turn.

Constitutional provisions usually lack a fixed, definitive original meaning apparent on the face of constitutional text that is sufficient to decide specific cases. As many have observed, history is complicated and contested, and neither judges nor their clerks are typically trained in the discipline. "Originalist source material is sometimes scarce and sometimes endless. It often does not specifically address the question that must be decided. When it does address that question, it often does so in many different voices, no one of which has a greater claim to authority than the others." Primus, *Limits of Interpretivism*, 32 Harv J L & Pub Pol'y 159, 170 (2009); see also Fallon, *The Many and Varied Roles of History in Constitutional Adjudication*, 90 Notre Dame L Rev 1753, 1758 (2015) ("[E]ither the original public meaning of constitutional language or the proper application of that meaning to particular cases frequently cannot be identified as a matter of simple historical fact."); Barrett, *Originalism & Stare Decisis*, 92 Notre Dame L Rev 1921, 1921 (2017) ("For an originalist, the meaning of the text is fixed *so long as it is discoverable*.") (emphasis added). Original understandings of constitutional provisions are therefore subject to differing interpretations. *The Many and Varied Roles of History*, 90 Notre Dame L Rev at 1798 ("[H]istorical facts alone will frequently fail to prove

the existence of an original intent, original understanding, or original public meaning that is sufficiently clear and determinate to resolve modern controversies."); Primus, *When Should Original Meanings Matter?*, 107 Mich L Rev 165, 214 (2008) ("[T]ellingly, many of the original meanings that operate as clear authority in constitutional law have actually achieved that clarity less because the underlying originalist source material was clear than because the United States Supreme Court issued a decision adopting a particular reading of that source material as authoritative.").

Not surprisingly, then, judges too routinely disagree about "the" most faithful original meaning of constitutional provisions. See, e.g., *New York State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US 1; 142 S Ct 2111; 213 L Ed 2d 387 (2022); *id*. at 83-132 (Breyer, J., dissenting) (disagreeing with the majority opinion over the original meaning of the Second Amendment of the United States Constitution); *District of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008); *id*. at 636-680 (Stevens, J., dissenting) (same); *id*. at 681-723 (Breyer, J., dissenting) (same); *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005); *id*. at 672-684 (CAVANAGH, J., dissenting) (disagreeing over the original meaning of "accrued financial benefits" in Article 9, § 24 of the Michigan Constitution).

Tacking to original meaning may make it just as likely that judges' policy preferences drive a result, intentionally or unintentionally, but either way less transparently. Indeed, as Professor Cary Franklin explained in her critique of the United States Supreme Court's decision in *Bostock v Clayton Co, Georgia*, 590 US ___; 140 S Ct 1731; 207 L Ed 2d 218 (2020), adherence to original meaning does not offer more

objectivity than other methods of interpretation. It allows rather for disguised policy choices about how to interpret text, such as which bits of text to subject to textualist analysis; whether to consult a dictionary or a corpus linguistics database and, if so, which dictionary or database to use; and which definition to select—to name just a few. See Franklin, *Living Textualism*, 2020 Sup Ct Rev 119, 125 (2021) ("[O]riginal public meaning is a judicial construct. It is not something judges find, but something they produce—and something they need to produce because, in the kind of conflicts that reach the Court, there generally is not a single truth of the matter from a semantic standpoint."); see also *Limits of Interpretivism*, 32 Harv J L & Pub Pol'y at 170 ("[O]riginalism is a poor strategy for establishing clear rules of decision in advance of particular cases."); Choi, *Computational Corpus Linguistics* (July 1, 2022) (unpublished manuscript), p 1, available to download at <https://ssrn.com/abstract=4151849> (accessed July 20, 2022) [https://perma.cc/Z9US-VALM] ("[T]he traditional approach to corpus linguistics encounters several problems. It focuses on word frequencies at the expense of subtler linguistic cues and presents no clear dividing line between correct and incorrect textual meanings. It also requires a variety of subjective and opaque judgment calls, allowing motivated interpreters to cherry-pick the method that supports their favored meanings.").

Of course, judges should consult and consider all sources and dimensions of original meaning in analyzing constitutional text in applying constitutional provisions to specific cases. But I don't know any who don't. Often, however, a particular textual phrase—"cruel or unusual punishment," for example—doesn't allow us to resolve every application of that provision even if we *can* know what the ratifiers of the Consti-

tution thought it meant in 1963. In such cases, judges shouldn't pretend that we have some objective original meaning that requires a specific result.

But Justice ZAHRA isn't suggesting only that he would interpret Article 1, § 16 according to its original meaning (as he determines that original meaning), if called to do so, against a blank canvas. He would also overrule 50 years of this Court's precedent because, in his revisionist view, the Court's methodology was off. When the Court has for 50 years approached new iterations of a question governed by broad constitutional text with a specific analysis, it is immodest indeed to pitch that away because now, in 2022, one can determine somehow that the ouija board has spoken and the 1963 ratifiers meant something else by that broad language.

Such an approach renders stare decisis irrelevant. Yet stare decisis is an important commitment for courts because it allows people to order their affairs consistently with the law's requirements. We therefore normally require more than a majority of a court thinking that precedent was incorrectly decided. See *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000) (discussing the other factors to be considered before overruling a prior decision). After all, if we fully agreed with the way a previous case was decided we wouldn't need stare decisis—we'd just decide the next related question the same way. If stare decisis means anything, it means not every judicial decision is up for grabs from scratch. On the other hand, if original meaning provides a stare decisis override,[5]

[5] Even committed originalists have recognized that judges should not upset settled expectations, even when a precedent departs from the "original" meaning of a constitutional provision. See, e.g., Barrett & Nagle, *Congressional Originalism*, 19 U Pa J Const L 1, 1 (2016) ("Some

then it provides a platform for judges to make policy choices while claiming they are doing something else. (I set aside that constitutional ratifiers would be generally familiar with the doctrine of stare decisis and conferred constitutional judicial power in recognition of it. In that sense, stare decisis has an originalist element itself.)

Justice ZAHRA would apparently still overturn our longstanding doctrine applying Article 1, § 16 if four members of this Court, lacking historical training, divine that the ratifiers in 1963 had a unanimous and specific understanding of a prohibition against "cruel or unusual punishment" that was not to be applied over time *and* that did not include a prohibition against parolable life sentences for young people. Such new forms of judicial immodesty are likely to erode confidence in judicial neutrality.

ZAHRA, J. (*dissenting*). In 1991, defendant murdered two people one month before he turned 18 years old. Defendant fatally shot his first victim because he believed the victim had shot an acquaintance of his. Three days later, defendant fatally shot his second victim because the victim's friend had attempted to rob defendant the day before. Defendant pleaded guilty to two counts of second-degree murder in exchange for

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decisions thought inconsistent with the Constitution's original public meaning are so well baked into government that reversing them would wreak havoc."). Justice Scalia emphasized that originalism should not be used to undo settled constitutional principles. Scalia, *A Matter of Interpretation: Federal Courts & the Law* (Princeton: Princeton University Press, 1997), pp 138-139 ("Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. . . . [O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.").

the dismissal of one count of first-degree murder—a conviction for which, at the time, carried with it a sentence of mandatory life without parole—and an agreed-upon sentence of life with the possibility of parole (parolable life).[1] Defendant became eligible for parole after serving 10 years in prison.[2] After the Supreme Court of the United States held in *Miller v Alabama*[3] that mandatory life without parole is unconstitutional for juvenile homicide offenders and held in *Montgomery v Louisiana*[4] that *Miller* applied retroactively, defendant filed this successive motion for relief from judgment seeking to withdraw his plea or, alternatively, have his parolable life sentences declared unconstitutional in light of *Miller* and *Montgomery*. The trial court denied defendant relief from the judgment, and the Court of Appeals affirmed. This Court granted defendant's application for leave to appeal on a number of issues regarding the validity of his plea and sentencing agreement and the constitutionality of his parolable life sentences.

I agree with the majority opinion that defendant's plea and sentencing agreement were not illusory or invalid, but instead were knowingly, voluntarily, and intelligently entered into by defendant. I disagree, however, with the majority opinion's conclusion that defendant's parolable life sentences constitute "cruel

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[1] Defendant also pleaded guilty to two counts of possession of a firearm during the commission of a felony (felony-firearm). The parolable life sentences were to be served consecutively to two concurrent terms of two years' imprisonment for the felony-firearm convictions. See MCL 750.227b(1).

[2] MCL 791.234(7)(a).

[3] *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

[4] *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016).

or unusual punishment" under Const 1963, art 1, § 16. Far from being constitutionally disproportionate, defendant's parolable life sentences match the severity of his two murder convictions while still affording him a meaningful opportunity to be reintegrated into society. For reasons more thoroughly developed in this opinion, I dissent from the majority opinion's conclusion that defendant's parolable life sentences are invalid and that he is entitled to relief from judgment under MCR 6.508(D).

I. STANDARD OF REVIEW AND ENTITLEMENT TO RELIEF FROM JUDGMENT

A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion.[5] "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes."[6] "The proper interpretation and application of a court rule is a question of law that is reviewed de novo."[7] Questions of constitutional law are also reviewed de novo.[8]

To be entitled to relief from judgment under MCR 6.508(D),[9] defendant must show "good cause" for failing to raise the grounds for relief on appeal or in the

[5] *People v Hewitt-El*, 501 Mich 1031 (2018).

[6] *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted).

[7] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

[8] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[9] For the reasons stated in Justice CLEMENT's concurrence in *People v Manning*, 506 Mich 1033, 1036-1039 (2020), I agree with the majority opinion's conclusion that defendant's successive motion for relief from judgment is "based on a retroactive change in law that occurred after [defendant's] first motion for relief from judgment" and, therefore, satisfies the procedural bar in MCR 6.502(G)(2).

prior motion and "actual prejudice" from the alleged irregularities that support the claim for relief.[10] MCR 6.508(D)(3)(b) states that actual prejudice, in relevant part, occurs when:

> (ii) in a conviction entered on a plea of guilty, . . . the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
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> * * *
>
> (iv) in the case of a challenge to the sentence, the sentence is invalid.

II. RELEVANT LAW

The Eighth Amendment of the United States Constitution proscribes the imposition of "cruel and unusual punishments."[11] In *Miller*, the Supreme Court of the United States held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments."[12] The Supreme Court reasoned that juveniles' lack of maturity, vulnerability to negative influence, and transitory personality traits render them "constitutionally different from adults for purposes of sentencing."[13] These "distinctive attributes of youth diminish the penological justifications for imposing" life without parole on juvenile homicide offenders, and "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, [a sentencing scheme man-

[10] MCR 6.508(D)(3)(a) and (b).

[11] US Const, Am VIII.

[12] *Miller*, 567 US 465 (quotation marks omitted).

[13] *Id*. at 471.

dating life without parole for juvenile homicide offenders] poses too great a risk of disproportionate punishment."[14] Therefore, the Supreme Court in *Miller* held that before sentencing a juvenile homicide offender to life without parole, a sentencing court must first have an opportunity to consider the distinctive attributes of youth, i.e., the *Miller* factors.[15] The *Miller* Court clarified, however, that its holding "mandate[s] '*only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence"[16] and that " '[a] State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' "[17]

In *Montgomery*, the Supreme Court held that *Miller* applies retroactively to juvenile homicide offenders

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[14] *Id*. at 472, 479.

[15] Those factors include: (1) "[a defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) whether "he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation." *Id*. at 477-478.

[16] *Jones v Mississippi*, 593 US ___; 141 S Ct 1307, 1314; 209 L Ed 2d 390 (2021) (emphasis added), quoting *Miller*, 567 US at 483.

[17] *Miller*, 567 US at 479, quoting *Graham v Florida*, 560 US 48, 75; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (holding that the Eighth Amendment bars life without parole for a juvenile convicted of a nonhomicide offense).

whose convictions and sentences were final when *Miller* was decided.[18] The Supreme Court assured that

> [g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. *A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them*. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.[19]

In response to *Miller*, our Legislature enacted MCL 769.25 and MCL 769.25a, which provide relief to juvenile homicide offenders who committed certain crimes that, before *Miller*, would have mandated life without parole.[20] Under those statutes, if the prosecution seeks a life-without-parole sentence, the sentencing court is required to conduct a hearing to consider the *Miller* factors and specify on the record the aggravating and mitigating circumstances that the court considered in imposing its sentence.[21] If the prosecution does not seek a life-without-parole sentence, the sentencing court must sentence the defendant to a term of years, in which the minimum sentence is between 25 and 40 years' imprisonment.[22] Notably,

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[18] *Montgomery*, 577 US 190.

[19] *Id*. at 212 (citation omitted; emphasis added).

[20] MCL 769.25a was enacted in anticipation that *Miller* would apply retroactively. It applies to juvenile homicide offenders who were sentenced to mandatory life without parole prior to *Miller* and provides essentially the same substantive relief as MCL 769.25.

[21] MCL 769.25(6), (7); MCL 769.25a(4)(b).

[22] MCL 769.25(9); MCL 769.25a(4)(c).

MCL 769.25 and MCL 769.25a do not list second-degree murder as an eligible offense triggering either a *Miller* hearing or a term-of-years sentence. Those statutes also do not address juvenile homicide offenders sentenced to parolable life.

Finally, the Michigan Constitution provides that "cruel *or* unusual punishment shall not be inflicted."[23] "The textual difference between the federal constitutional protection and the state constitutional protection is of consequence and has led this Court to conclude that Article 1, § 16 provides greater protection against certain punishments than its federal counterpart . . . ."[24] Our precedent provides that each pun-

[23] Const 1963, art 1, § 16 (emphasis added).

[24] *People v Carp*, 496 Mich 440, 519; 852 NW2d 801 (2014), cert gtd and opinion vacated sub nom on other grounds *Carp v Michigan*, 577 US 1186 (2016). Notwithstanding this statement in *Carp*, I question whether the textual difference between the two punishment clauses is a sufficient basis to conclude that the Michigan Constitution provides greater protection than the Eighth Amendment. Differing interpretative principles apply to each constitutional provision. The Supreme Court of the United States has stated that "[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 US at 58 (quotation marks and citations omitted). In interpreting the Michigan Constitution, however, "[o]ur goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers, the people, who are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have ratified the instrument in the belief that that was the sense designed to be conveyed." *People v Vaughn*, 491 Mich 642, 651 n 25; 821 NW2d 288 (2012) (quotation marks and citations omitted). Our task is to give effect to the meaning of the constitutional text that "the people who ratified the text *in 1963* gave to it," not "the meaning we as judges would prefer, or even the meaning the people of Michigan today would prefer[.]" *People v Nutt*, 469 Mich 565, 574 n 7; 677 NW2d 1 (2004) (quotation marks and citation omitted). In other words, while the protection afforded under the Eighth Amendment is constantly evolv-

ing, the protection afforded under Const 1963, art 1, § 16 remains as it was originally understood at the time of ratification.

It appears, however, that our caselaw concerning Const 1963, art 1, § 16 has gone astray by unthinkingly adopting the federal "evolving standards of decency" principle when it, in fact, conflicts with our general rule of constitutional interpretation. In *People v Lorentzen*, 387 Mich 167, 178-179; 194 NW2d 827 (1972), this Court appeared to incorporate the "evolving standards of decency" principle in deciding whether a sentence was constitutionally proportionate under both the United States and Michigan Constitutions, explaining that "[t]he decency test . . . looks to comparative law for guidelines in determining what penalties are widely regarded as proper for the offense in question." See *People v Coles*, 417 Mich 523, 530; 339 NW2d 440 (1983) (stating that, under *Lorentzen*'s analysis, "the definition of cruel or unusual punishment becomes a flexible one, changing with the evolving standards of decency as expressed by similar penal statutes"), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630 (1990). This Court in *People v Bullock*, 440 Mich 15, 33-35; 485 NW2d 866 (1992), simply accepted *Lorentzen*'s proportionality analysis without first questioning whether its adoption of the "evolving standards of decency" principle conflicted with our traditional method of constitutional interpretation.

In sum, while this Court has stated that the textual difference between the Eighth Amendment and Const 1963, art 1, § 16 leads to greater protection under the latter, it did so without consideration of the materially different interpretative methods applicable to each provision. Given this, I question whether the above cases interpret Const 1963, art 1, § 16 correctly and whether the ratifiers of the Michigan Constitution in 1963 understood the "cruel or unusual punishment" clause to provide greater protection than what the Eighth Amendment currently provides under our society's evolving standards of decency. Accordingly, I would revisit whether the textual difference between Const 1963, art 1, § 16 and the Eighth Amendment translates into a greater protection under the Michigan Constitution.

Rather than give any meaningful response to my criticisms regarding the precise legal question before this Court—i.e., the constitutional validity of a parolable life sentence for a juvenile homicide offender who specifically agreed to that sentence—Chief Justice MCCORMACK responds to this footnote with a 10-page diatribe expressing, among other things, her opposition to original-meaning jurisprudence. Chief Justice MCCORMACK claims my understanding of how we interpret the Michigan Constitution is "simply a factual contention." *Ante* at 324 (MCCORMACK,

C.J., concurring). Curious, considering this Court has consistently recognized that the Michigan Constitution is to be interpreted in accordance with " 'the text's original meaning [according] to the ratifiers, the people, at the time of ratification.' " *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 456; 952 NW2d 434 (2020), quoting *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). See also *Woodland v Mich Citizens Lobby*, 423 Mich 188, 219; 378 NW2d 337 (1985) (" 'Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action. They [the courts] must construe them as the people did in their adoption, if the means of arriving at that construction are within their power.' ") (ellipsis omitted), quoting *People ex rel Bay City v State Treasurer*, 23 Mich 499, 506 (1871) (opinion of the Court by COOLEY, J.); *Mich Farm Bureau v Secretary of State*, 379 Mich 387, 390-391; 151 NW2d 797 (1967) ("[T]he all important duty of the judiciary when constitutional provisions are brought up for interpretation and application . . . is to ascertain as best the Court may the general understanding and therefore the uppermost or dominant purpose of the people when they approved the provision or provisions thus brought up."); *Burdick v Secretary of State*, 373 Mich 578, 584; 130 NW2d 380 (1964) ("It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the people adopting it. . . . [W]e should endeavor to place ourselves in the position of the framers of the Constitution, and ascertain what was meant at the time. . . . It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change. It is therefore essential that we determine the intent of [a constitutional] provision by reference to the state of the law or custom previously existing, and by the contemporaneous construction, rather than attempt to test its meaning by the so-called advanced or liberal views obtaining among a large class of the community at the present day.") (quotation marks and citations omitted).

Chief Justice MCCORMACK now rejects our lodestar principle of constitutional interpretation, despite frequently subscribing to this standard as the appropriate method of constitutional interpretation in Michigan. See, e.g., *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 535; 975 NW2d 840 (2022) ("Our primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of common understanding. We locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification.") (quotation

marks and citation omitted); *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 60-61; 972 NW2d 738 (2021) (same); *Rafaeli*, 505 Mich at 456; (same); *Paquin v City of St Ignace*, 504 Mich 124, 129-130; 934 NW2d 650 (2019) (same); *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 61; 921 NW2d 247 (2018) (same); *Adair v Michigan*, 497 Mich 89, 101-102; 860 NW2d 93 (2014) (same). See also *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884, 886 (2019) (CLEMENT, J., concurring, joined by MCCORMACK, C.J.) ("When construing the Michigan Constitution, our primary goal is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of common understanding. Generally, we locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification . . . .") (cleaned up); *People v Cain*, 498 Mich 108, 132; 869 NW2d 829 (2015) (VIVIANO, J., dissenting, joined by MCCORMACK, C.J.) ("In interpreting the constitutional phrase 'trial by jury,' the guiding principle is to give the text the meaning it was understood to have at the time of its adoption by the people.") (quotation marks and citation omitted). My willingness to revisit our precedent interpreting Const 1963, art 1, § 16 is not, as the Chief Justice suggests, a frivolous request to overturn caselaw contrary to stare decisis. If anything, respecting stare decisis would demand adherence to our longstanding principle of constitutional interpretation discussed above, which dates back to at least 1871. Apparently, the Chief Justice is only concerned about stare decisis when it serves her interests.

Further, Chief Justice MCCORMACK embraces a cafeteria-style approach to constitutional interpretation, in which she picks any method that arguably supports her view. See *ante* at 325 n 2 (MCCORMACK, C.J., concurring). Chief Justice MCCORMACK's freewheeling approach to constitutional interpretation is simply not sound. The various interpretive tools used in the cases cited by the Chief Justice work toward a single purpose: to determine the original understanding of the ratifiers. Again, this Court has long held that our "primary objective" in interpreting a constitutional provision is to determine the text's original meaning according to the common understanding of the people at the time of ratification. *Rafaeli*, 505 Mich at 456 (quotation marks and citation omitted). And the Chief Justice concedes, as she must, that " 'the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished' " are helpful in accomplishing our objective. *Ante* at 325 n 2 (MCCORMACK, C.J., concurring), quoting *State Hwy Comm v Vanderkloot*, 392 Mich 159, 179; 220 NW2d 416 (1974). For example, we have repeatedly recognized that contemporary

ishment clause contains a proportionality component making criminal sentences subject to appellate re-

sources, such as the constitutional convention debates, the Address to the People, and dictionaries in circulation at the time of ratification may aid us in ascertaining how the constitutional text was commonly understood according to the people when they ratified it. See *People v Tanner*, 496 Mich 199, 224-226; 853 NW2d 653 (2014); *League of Women Voters*, 508 Mich at 537 n 7 (looking to dictionaries "more contemporaneous with the ratification of the [Michigan] Constitution" in interpreting Const 1963, art 2, § 9).

Chief Justice MCCORMACK also attributes to me many things not expressed or implied in this footnote. For example, Chief Justice MCCORMACK asserts it is my position that "[a]lthough the ratifiers of Const 1963, art 1, § 16 adopted language nearly identical to the Eighth Amendment, they meant . . . something far less." *Ante* at 325 (MCCORMACK, C.J., concurring). It is plainly obvious to any reasonable person that I make no such assertion in this footnote. I simply question whether this Court was correct when it concluded without significant analysis that Article 1, § 16 provides *greater* protection than that provided under the Eighth Amendment. This is not a novel concept. Multiple commentators have observed that the phrases "cruel and unusual" and "cruel or unusual" were used interchangeably in early American history, with both formulations capturing the same meaning. See, e.g., Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm & Mary Bill Rts J 475, 503-504 (2005); Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 Brit J Am Legal Stud 297, 313 (2013); Casale & Katz, *Would Executing Death-Sentenced Prisoners After the Repeal of the Death Penalty Be Unusually Cruel Under the Eighth Amendment?*, 86 Conn B J 329, 336 (2012). And, as Justice RILEY noted in her partial dissenting opinion in *Bullock*, there is no evidence that "the replacement of the conjunctive 'and' by the disjunctive 'or' supports the argument that the drafters of the state constitution intended for this Court to interpret the phrase differently from the meaning that the United States Supreme Court has given the Eighth Amendment." *Bullock*, 440 Mich at 58-61 (RILEY, J., concurring in part and dissenting in part).

Chief Justice MCCORMACK makes other claims that grossly mischaracterize my position. Rather than rebut each of her assertions, I leave it to the reader to determine whether this footnote merits the uncharacteristic ad hominem attack expressed by the Chief Justice.

view.[25] In *People v Lorentzen* and *People v Bullock*, this

[25] See *Graham*, 560 US at 59 ("The concept of proportionality is central to the Eighth Amendment."); *Harmelin v Michigan*, 501 US 957, 997, 1001; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (concluding that "the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle" that "forbids only extreme sentences that are 'grossly disproportionate' to the crime"), quoting *Solem v Helm*, 463 US 277, 288, 303; 103 S Ct 3001; 77 L Ed 2d 637 (1983). See also *Bullock*, 440 Mich at 27-35 (holding that Michigan's ban on cruel or unusual punishment includes a prohibition on grossly disproportionate sentences), citing *Lorentzen*, 387 Mich at 171-181.

However, I question the above caselaw, given the many jurists who have opined that neither the Eighth Amendment nor Const 1963, art 1, § 16 contain a proportionality component. See *Graham*, 560 US at 99 (Thomas, J., dissenting, joined by Scalia, J.) ("[T]he Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous '*methods* of punishment,' "and "does not expressly refer to proportionality or invoke any synonym for that term[.]"), quoting *Harmelin*, 501 US at 965, 976 (opinion by Scalia, J., joined by Rehnquist, C.J.) (stating that the Cruel and Unusual Punishments "Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed" and does not contain a "proportionality guarantee"). See also *People v Correa*, 488 Mich 989, 990-992 (2010) (MARKMAN, J., concurring, joined by CORRIGAN and YOUNG, JJ.) (stating that Const 1963, art 1, § 16 does not contain a proportionality component; that the prohibition against cruel or unusual punishment only forbids certain modes or methods of punishment; and "that because 'imprisonment . . . is, and always has been, in this country and in all civilized countries, one of the methods of punishment,' it does not violate the Cruel or Unusual Punishment Clause") (brackets and emphasis omitted), quoting *People v Morris*, 80 Mich 634, 639; 45 NW 591 (1890); *Bullock*, 440 Mich at 48 (RILEY, J., concurring in part and dissenting in part) ("[T]he 'cruel or unusual punishment' clause was intended to prohibit inhumane and barbarous treatment of the criminally convicted, and does not have a proportionality component."). Although I am bound to follow the interpretation of the Eighth Amendment espoused by the Supreme Court of the United States and "to enforce the rights conferred by" that Court, *People v Tanner*, 496 Mich 199, 219 n 10; 853 NW2d 653 (2014), I would revisit this Court's interpretation of Const 1963, art 1, § 16 as containing a proportionality component. See *Manning*, 506 Mich at 1034-1035 (MARKMAN, J., concurring, joined by ZAHRA, J.).

Court set forth a four-prong test to assess whether a sentence is constitutionally proportionate.[26] That test, which "bears a considerable resemblance to the federal test for proportionality,"[27] requires an assessment of (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation.[28]

III. ANALYSIS

A. ILLUSORY PLEA BARGAIN

Defendant first argues that *Miller* and *Montgomery* have rendered his plea illusory and invalid; that is, because mandatory life without parole for juvenile homicide offenders is now an unconstitutional sentence, defendant contends that his plea and sentencing agreement has no benefit and that he is therefore entitled to withdraw his plea. I agree with the majority opinion that this argument lacks merit. Defendant benefited from the plea and sentencing agreement at the time it was entered into by (1) avoiding a possible conviction of first-degree murder and a mandatory

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[26] See *Bullock*, 440 Mich at 33-34; *Lorentzen*, 387 Mich at 176-181.

[27] *Carp*, 496 Mich at 520.

[28] *Bullock*, 440 Mich at 33-34. See also *Solem*, 463 US at 292 ("[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.").

life-without-parole sentence attached to that conviction, and (2) becoming eligible for parole after serving 10 years' imprisonment. Even after *Miller* and *Montgomery*, defendant continues to benefit from the agreement by avoiding a life-without-parole sentence and remaining eligible for parole. As the Supreme Court of the United States stated in *Brady v United States*:

> A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended . . . the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts . . . hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.[29]

That defendant did not anticipate the Supreme Court of the United States would render mandatory life without parole an unconstitutional sentence for juvenile homicide offenders does not undermine the validity of his guilty plea, nor does it render his plea illusory or without any benefit. To be sure, "[s]ome element of pressure exists in every deal, as the tradeoff between present certainty and future uncertainty is emblematic

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[29] *Brady v United States*, 397 US 742, 757; 90 S Ct 1463; 25 L Ed 2d 747 (1970) (citation omitted).

of the process of plea bargaining."[30] After all, a plea agreement is a contract, and "[c]ontracts in general are a bet on the future."[31] But there is "no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops . . . that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions."[32] Accordingly, defendant has failed to show that he is entitled to relief under MCR 6.508(D) because there was no "defect in the proceedings . . . render[ing] the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand,"[33] and his plea was not otherwise illusory entitling him to withdraw it.[34]

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[30] *Dingle v Stevenson*, 840 F3d 171, 175 (CA 4, 2016); *Brady*, 397 US at 756-757 ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time.").

[31] *Dingle*, 840 F3d at 175.

[32] *Brady*, 397 US at 757.

[33] MCR 6.508(D)(3)(b)(ii).

[34] Moreover, by entering into a valid plea and sentencing agreement, defendant arguably waived his ability to challenge the validity of his sentence under *Miller* and *Montgomery*. See *People v Likine*, 492 Mich 367, 409; 823 NW2d 50 (2012) ("An unconditional guilty plea that is knowing and intelligent waives claims of error on appeal, *even claims of constitutional dimension*.") (emphasis added). See also *People v Jones*, 2021 IL 126432, ¶ 21; 190 NE3d 731 (2021) ("Fundamentally, plea agreements are contracts, and principles of waiver apply equally to them."). Some courts faced with requests to extend the reasoning of *Miller* and *Montgomery* beyond life-without-parole sentences have held that a defendant's decision to enter into a plea and sentencing agreement waives any claim that a less-than-nonparolable-life sentence is

B. CONSTITUTIONALITY OF DEFENDANT'S PAROLABLE LIFE SENTENCES

In the alternative, defendant argues that his parolable life sentences amount to cruel and/or unusual punishment under the United States and Michigan Constitutions. I disagree.

There is no question that defendant's parolable life sentences are constitutionally proportionate under the Eighth Amendment. The majority opinion correctly notes that *Montgomery* explicitly approved of parolable life sentences as a means for states to remedy *Miller* violations without having to "relitigate sentences."[35] More compelling, however, is the Supreme Court's

unconstitutional under those decisions. See, e.g., *id*. at ¶ 26 (concluding that the juvenile homicide offender's "knowing and voluntary guilty plea [to a 50-year sentence] waived any constitutional challenge based on subsequent changes in the applicable law"); *Jones v Commonwealth*, 293 Va 29, 45; 795 SE2d 705 (2017) (holding that defendant's negotiated plea agreement "waived his right to challenge his sentence on direct appeal and, *a fortiori*, on collateral attack"; that his claim for relief under *Miller* and *Montgomery* was not "immunized from waiver principles that govern all other constitutional challenges"; and that "[n]othing in *Montgomery* undermines settled waiver principles"). See also *Carp*, 577 US at 1186 (Thomas, J., concurring, joined by ALITO, J.) ("On remand [in light of *Montgomery*], courts should understand that the Court's disposition of these petitions does not reflect any view regarding petitioner's entitlement to relief. The Court's disposition does not, for example, address . . . *whether petitioners forfeited or waived any entitlement to relief* (*by, for example, entering into a plea agreement waiving any entitlement to relief*), or whether petitioners' sentences actually qualify as mandatory life without parole sentences.") (emphasis added). But see *Malvo v Mathena*, 893 F3d 265, 275-277 (CA 4, 2018) (declining to hold that the defendant waived his ability to challenge, on the basis of *Miller* and *Montgomery*, the constitutionality of his life-without-parole sentence imposed pursuant to an otherwise valid plea agreement), abrogated on other grounds by *Jones*, 593 US at ___; 141 S Ct at 1318-1319. Because defendant knowingly and voluntarily entered into his plea and sentencing agreement—a bargain that he continues to benefit from even after *Miller* and *Montgomery*—it is questionable whether this Court should further entertain his constitutional challenges to his parolable life sentences. Yet the majority opinion grants defendant relief without even considering this issue.

[35] *Montgomery*, 577 US at 212.

emphasis on the type of sentences to which *Miller* actually applies. Again, "the *Miller* Court mandated *only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing *a life-without-parole sentence*."[36] Given that defendant undisputedly did not receive a life-without-parole sentence, his Eighth Amendment challenge lacks merit.

Defendant's attempt to bring in the Michigan Constitution to do what the Eighth Amendment cannot must also fail. Applying the four-factor test from *Lorentzen* and *Bullock*,[37] parolable life sentences for juvenile homicide offenders are not constitutionally disproportionate under Const 1963, art 1, § 16.

With regard to the first factor, this Court has explained that first-degree murder—which includes the "the premeditated taking of an innocent human life"—is the most serious offense under Michigan law and that the Legislature's imposition of life without parole for that offense, even for juveniles, is a proportionate punishment.[38] Given that second-degree murder, also known as malice murder,[39] would be the second most serious offense that a person can commit under Michigan law, it is only natural that the second most serious punishment, i.e., parolable life, accom-

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[36] *Jones*, 593 US at ___; 141 S Ct at 1316 (quotation marks and citation omitted; emphasis added).

[37] *Supra* at 343-344.

[38] *Carp*, 496 Mich at 514-515.

[39] "Malice" is an element of second-degree murder, *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007), and is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm," *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

pany a conviction of that offense. Logically then, the severity of a parolable life sentence is proportionate to the gravity of a second-degree murder conviction.[40]

With regard to the second factor, parolable life is not an uncommon sentence for serious crimes committed in Michigan—even for those crimes that do not involve the taking of an innocent person's life. Some common, nonhomicide felonies subject to parolable life include assault with intent to murder, armed robbery, and first-degree criminal sexual conduct.[41] That Michigan penalizes *nonhomicide* offenses with parolable life demonstrates that it is not a constitutionally disproportionate sentence for *homicide* offenses, some of which are committed by offenders who intended to kill their victims.

As to the third factor, parolable life is a common sentence for juvenile offenders in other states.[42] The majority opinion's reliance on jurisdictions that extend

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[40] Defendant contends, and the majority opinion suggests, that parolable life for juveniles is the most serious punishment because sentencers are required to conduct a *Miller* hearing before imposing life without parole. That an extra procedural step is necessary before imposing life without parole on a juvenile homicide offender does not alter the fact that a life-without-parole sentence is still a valid sentence and, therefore, remains "the law's harshest term of imprisonment" for juvenile offenders. *Miller*, 567 US at 474.

[41] MCL 750.83; MCL 750.529(2); MCL 750.520b(2)(a). Other offenses subject to parolable life sentences include: first-degree arson, MCL 750.72(3); bank robbery, MCL 750.531; carjacking, MCL 750.529a(1); first-degree child abuse, MCL 750.136b(2); and kidnapping, MCL 750.349(3).

[42] See The Sentencing Project, *Youth Sentenced to Life Imprisonment* (October 2019), p 1 ("[A]ll states allow juveniles to be sentenced to life imprisonment, and all but two states have persons serving a life or 'virtual life' sentence for a crime committed as a juvenile."), available at <https://www.sentencingproject.org/publications/youth-sentenced-life-imprisonment/> (accessed May 19, 2022) [https://perma.cc/NC9E-XX4N].

Miller's rationale to "de facto" life sentences is inapposite. A "de facto" life sentence, also known as a "virtual" life sentence, is a sentence that "foreclose[s] the defendant's release from prison for all or virtually all of his expected remaining life span"[43] and often involves lengthy term-of-years sentences under which the defendant is not eligible for parole until he or she is geriatric. Such sentences are necessarily distinct from a parolable life sentence in which the defendant becomes parole eligible much earlier in life.[44] The de facto life-sentencing cases are a far cry from the circumstances here, in which defendant's parolable life sentence rendered him eligible for parole after serving just 10 years in prison. And, even assuming defendant's parolable life sentences can be properly labeled "de facto" life sentences, a number of courts have rejected the notion that *Miller* applies to de facto life sentences for juvenile homicide offenders.[45] In short, Michigan is hardly an outlier in imposing parolable life sentences for juvenile homicide offenders.

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[43] *Williams v United States*, 205 A3d 837, 844 (DC, 2019). See also *State v Ramos*, 187 Wash 2d 420, 434; 387 P3d 650 (2017) (defining a "de facto life sentence" as one "result[ing] in a total prison term exceeding the average human life-span").

[44] See Restore Justice, *Know More: De Facto Life Sentences* <https://restorejustice.org/about-us/resources/know-more/know-more-de-facto-life-sentences> (accessed May 19, 2022) [https://perma.cc/SJ38-6KU5] ("De facto life sentences (also known as "virtual" life sentences) refer to *non-life sentences* that are so long the sentenced person will likely die or live out a significant majority of their lives before they are released.") (emphasis added).

[45] See *State v Slocumb*, 426 SC 297, 313, 315 n 17, 315-323; 827 SE2d 148 (2019) (collecting cases illustrating an approximately even split of authority as to whether the Eighth Amendment, as interpreted by *Graham* and *Miller*, prohibits de facto life sentences for juvenile offenders convicted of nonhomicide and homicide offenses alike).

Finally, with respect to the fourth factor, defendant's sentences made him eligible for parole after serving 10 years' imprisonment and allow him to be reconsidered for parole every five years.[46] His sentences therefore serve the penological goal of rehabilitation. They also serve "other critical penological goals, such as securing a just and proper punishment as determined by a self-governing people and their representatives; the general deterrence of other potential criminal offenders; and the individual deterrence, and incapacitation, of the individual offender himself."[47]

Overall, *none* of the four *Lorentzen*/*Bullock* factors supports the conclusion that parolable life is a constitutionally disproportionate sentence when imposed on a juvenile homicide offender. Accordingly, defendant has not shown that his sentences are unconstitutional under either the Eighth Amendment or Const 1963, art 1, § 16 and has not carried his burden of proving that his sentences are invalid. Therefore, defendant has not established actual prejudice under MCR 6.508(D) and is not entitled to relief from judgment.

IV. FLAWS IN THE MAJORITY OPINION'S LEGAL ANALYSIS

The majority opinion supports its application of the four *Lorentzen*/*Bullock* factors to defendant's parolable life sentences with several contentions with which I do not agree.

First, the majority opinion asserts that juvenile homicide offenders sentenced to life *with* the possibility of parole "are at risk to serve precisely the same sentence" as those offenders sentenced to life *without* the possibility of parole, and that the former group of

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[46] MCL 791.234(7)(a) and (8)(b).

[47] *Manning*, 506 Mich at 1036 (MARKMAN, J., concurring).

offenders "may receive the same sentence with less process" than the latter group.[48] It is wholly unreasonable to suggest that a nonparolable life sentence is the same as a parolable life sentence. Such an assertion flies in the face of the *Montgomery* Court's guidance that states may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole and renders the distinction the Supreme Court made between parolable and nonparolable life sentences utterly meaningless. Further, the only "process" required by *Miller* is that sentencing courts be given the discretion to consider an offender's youth and to impose a sentence less than life without parole.[49] Here, defendant bargained for a parolable life sentence, and the sentencing court had the discretion to reject that sentence if it believed it was not tailored to defendant and his offenses.[50] Therefore, even though defendant is

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[48] *Ante* at 316.

[49] *Jones*, 593 US at ___; 141 S Ct at 1318 (explaining that *Miller* required "a discretionary sentencing procedure . . . where the sentencer can consider the defendant's youth and has discretion to impose a lesser sentence than life without parole").

[50] See *People v Killebrew*, 416 Mich 189, 206-207; 330 NW2d 834 (1982) ("If the sentence bargain includes a sentence agreement, whereby the defendant agrees with the prosecuting attorney to plead guilty in exchange for a specific sentence disposition, the court must accept or reject the agreement or defer action until the judge has had the opportunity to consider the presentence report. . . . If the judge feels that the agreed-upon disposition will serve the interests of justice, he may accept the agreement. . . . However, if the judge, in the exercise of his discretion, finds that the bargain is not tailored to reflect the particular circumstances of the case or the particular offender, he shall reject the plea at that time."). See also *Jones*, 2021 IL 126432, ¶ 27-28 (holding that the sentencing court's authority to accept or reject the defendant's plea and sentencing agreement "necessarily constituted an exercise of its discretion," thereby satisfying the constitutional requirements of *Miller*).

not entitled to relief under *Miller* and *Montgomery*, he received all the process that those decisions require.

Next, the majority opinion asserts that "a parolable life sentence for second-degree murder is often *more* severe than the minimum sentences now given to most juveniles who commit *first-degree* murder: 25 to 40 years," and purports to explain why the Legislature's chosen *Miller* remedy, MCL 769.25 and MCL 769.25a, renders defendant's parolable life sentences constitutionally disproportionate.[51] The inference from the majority opinion's juxtaposition of parolable life sentences and term-of-years sentences under MCL 769.25 and MCL 769.25a is that, had the Legislature simply chosen to change all nonparolable life sentences for juvenile homicide offenders to parolable life sentences, such a scheme would be constitutionally permissible. But, because the Legislature decided to retain life without parole as a permissible sentence for some Michigan juvenile homicide offenders and permit term-of-years sentences for others, the majority opinion concludes that parolable life sentences are unconstitutional for *all* juvenile homicide offenders. Put another way, the majority opinion concludes that parolable life for juvenile homicide offenders is unconstitutional because the Legislature excludes parolable lifers like defendant from its chosen *Miller* remedy—

[51] *Ante* at 316. The majority also asserts a general rule that "the Parole Board's authority extends only to the[] sixtieth year of incarceration" for juvenile homicide offenders sentenced and resentenced under MCL 769.25 and MCL 769.25a. *Ante* at 318. This is not necessarily accurate. Juvenile homicide offenders ordered to serve term-of-years sentences post-*Miller* receive a maximum sentence that "shall be not less than 60 years," MCL 769.25(9), while offenders benefiting from *Montgomery* receive a maximum sentence that "shall be 60 years," MCL 769.25a(4)(c). Thus, a defendant sentenced under MCL 769.25(9) may be subject to a lengthier maximum sentence than a defendant resentenced under MCL 769.25a(4)(c).

even though those offenders do not fall within the purview of *Miller*. This is truly a remarkable conclusion, as the majority opinion uses the Legislature's chosen *Miller* remedy as a justification for finding parolable life sentences constitutionally disproportionate. This is nothing short of second-guessing the Legislature's policy decisions, which we may not do.[52]

In any event, the facts of defendant's case demonstrate why his parolable life sentences are not more severe than the term-of-years sentences imposed under MCL 769.25 and MCL 769.25a. Defendant's agreed-upon sentences of parolable life allowed him to become eligible for parole after serving just 10 years in prison, and he remains parole eligible to this day. On the other hand, if defendant were entitled to the same relief as those offenders resentenced under MCL 769.25a, the sentencing court could impose the maximum term-of-years sentence of 40 to 60 years, meaning defendant would no longer be eligible for parole. In fact, the roughly 29 years of imprisonment that defendant has served up to this point is at the lower end of the 25- to 40-year allowable minimum sentence. And, given that defendant committed *multiple* murders one month shy of turning 18 years old, it is very possible, if not likely, that he would receive the maximum 40-year minimum sentence were he eligible for resentencing under that scheme. In short, it is far from clear that defendant's parolable life sentences are more severe—let alone constitutionally disproportionate—than the term-of-years sentences imposed under MCL 769.25

[52] *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002) ("[O]ur judicial role precludes imposing different policy choices than those selected by the Legislature[.]") (quotation marks and citation omitted).

and MCL 769.25a, particularly since defendant himself bargained for his parolable life sentences in the first place.[53]

Finally, the majority opinion contends that parolable life for juvenile homicide offenders does not advance the penological goal of rehabilitation because parolable lifers have less access to rehabilitative programming than offenders serving a term-of-years sentence and because the decision to grant parole is subject to the varying policies of the Parole Board. That is, the majority opinion faults the Department of Corrections and the Parole Board for making it difficult for parolable lifers like defendant to obtain release. A motion for relief from judgment challenging the constitutionality of an otherwise valid sentence is hardly the appropriate vehicle to launch an attack on the policies and procedures of the executive branch.[54] But in any

[53] Defendant speculates that he would have benefited from going to trial as charged, losing, and being sentenced to mandatory life without parole so that he could receive relief under *Miller*, *Montgomery*, and MCL 769.25a. Not only does defendant's hindsight ignore the teachings of *Brady*, see *supra* at 345, he also fails to appreciate that life without parole is still a valid sentence for juvenile homicide offenders under Michigan law. See *Carp*, 496 Mich at 528 (holding that neither the Eighth Amendment nor Const 1963, art 1, § 16 categorically barred the imposition of life without parole on juvenile homicide offenders). Thus, while it is possible that defendant could have received a term-of-years sentence had he been convicted of first-degree murder and obtained relief under *Miller* and *Montgomery*, it is also possible that he could have received the greater—and still constitutionally permissible—sentence of life without parole.

[54] See *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344322), p 9 ("The essence of defendant's sentence challenge . . . is that the policies and procedures of the parole board are unconstitutional based on an application of *Miller* and *Graham* . . . because they deprive defendant of any real possibility of parole . . . . However, invalidating defendant's valid sentence and resentencing him to a term[]of years is not the answer. The

event, statistics provided by the prosecution and the Attorney General demonstrate that parolable lifers have been paroled at a reasonable rate in the decade since *Miller* and *Montgomery* were decided; in fact, the rate for juvenile parolable lifers alone from 2016 to 2021 (20.6%) is even higher than the average rate of parole for the general prison population during that same time period (16.67%).[55] Further, the Michigan Department of Corrections recently amended its policy directives to now require the Parole Board to consider the distinctive attributes of youth recognized in *Miller*.[56] Although the Parole Board, after considering those mitigating factors, may nonetheless decide not to grant a juvenile parolable lifer an interview, the policy directives require the Board to give the prisoner "a Parole Board Notice of Decision . . . that shall set forth the factors considered for that decision and what corrective action the prisoner may take to improve the probability of being granted a parole in the future."[57] Parolable lifers therefore have the tools necessary to maximize their prospects for release.

Of course, as noted in the majority opinion, there is no "guarantee" that defendant will be released.[58] Michigan law simply does not require that someone sentenced to a parolable life sentence actually receive parole. Whether parole is awarded is left to the sound

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appropriate vehicle in which to seek redress of the alleged wrong done by the parole board is a claim for relief under 42 USC 1983 filed against the parole board."), citing *Wershe v Combs*, 763 F3d 500 (CA 6, 2014).

[55] These statistics rebut defendant's argument that the Parole Board currently employs a "life means life" policy.

[56] Michigan Department of Corrections, *Parole Process*, PD 06.05.104 (April 1, 2022), p 3, ¶ N, available at <https://perma.cc/T345-7QLN>.

[57] *Id*., ¶ O.

[58] *Ante* at 318.

discretion of the Parole Board. *Miller* demands nothing more. Aside from applying only to life-without-parole sentences, *Miller* requires only a "meaningful *opportunity* to obtain release based on demonstrated maturity and rehabilitation."[59] Nowhere did the Supreme Court in *Miller* or *Montgomery* state that juvenile homicide offenders are guaranteed release. Defendant had a genuine opportunity for parole when he was sentenced, and he still has that opportunity today. That he has not yet been granted parole does not mean he is deprived of a meaningful opportunity for release. Unlike the majority opinion, I would not entertain defendant's request to redefine what constitutes "a meaningful opportunity to obtain release."[60] *Montgomery* already provided an answer to that question—parolable life, which is precisely the sentence that defendant bargained for in exchange for pleading guilty to committing multiple murders.

V. SUMMARY AND RAMIFICATIONS OF THE MAJORITY'S CHANGES TO THIS STATE'S SENTENCING JURISPRUDENCE

Today, in this case and in four other juvenile sentencing cases, a majority of this Court makes law and adopts rules that are only tenuously related to the caselaw being cited in support of this action. These decisions are a radical departure from our criminal-sentencing jurisprudence. At the heart of all of these decisions is *Miller*'s holding that "mandatory life without parole for those under the age of 18 at the time of

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[59] *Miller*, 567 US at 479 (quotation marks and citation omitted; emphasis added); *Montgomery*, 577 US at 212 ("The *opportunity for release* will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.") (emphasis added).

[60] *Miller*, 567 US at 479 (quotation marks and citation omitted).

their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' "[61] A majority of this Court repeatedly uses the rationale of *Miller* to decide issues far beyond those related to mandatory life without parole for juvenile homicide offenders. It is important to briefly lay out the breadth of the majority's holdings in all of these cases and the flaws in its analyses.

Less than two years ago, this Court declined to extend *Miller*'s reasoning to 18-year-old homicide offenders sentenced to mandatory life without parole.[62] The law has not materially changed in the intervening two years, but this Court's composition has. In *People v Parks*, a bare majority of this newly comprised Court does an about-face and now uses the Michigan Constitution to apply *Miller* to such defendants who challenge their mandatory life-without-parole sentences on direct appeal.[63] The result is that mandatory life without parole is now unconstitutional for 18-year-old homicide offenders in the state of Michigan. Rather than being based in a sound interpretation of our Constitution, much of the majority's rationale is based on policy considerations that are properly within the purview of the Legislature, not this Court.[64] It is likely only a matter of time before the majority again flexes its judicial policymaking power to extend *Miller* further,[65] perhaps doing away with mandatory life without parole altogether.

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[61] *Id*. at 465 (quotation marks omitted).

[62] See *Manning*, 506 Mich 1033.

[63] *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022).

[64] See *id*. at 292-300 (CLEMENT, J., dissenting, joined by ZAHRA and VIVIANO, JJ.).

[65] See *id*. at 298-299 (CLEMENT, J., dissenting).

In *People v Poole*, a bare majority of this Court has set the stage for applying *Parks* retroactively, such that defendants who were 18 years old when they committed murder and were later sentenced to mandatory life without parole may challenge their sentences through motions for relief from judgment.[66] If the Court of Appeals accepts the majority's invitation to extend *Parks* in this way, trial courts will be faced with a slew of resentencings. This will exhaust precious judicial resources in an untold number of cases and will not only open up old wounds for the families of victims, but will also subject them to a whole new trauma—the prospect that their loved-ones' killers will be released from incarceration.

In the present case, the majority, again reading into our state Constitution, makes the astounding proclamation that our trial courts no longer have any discretion to sentence a juvenile convicted of second-degree murder to life *with the possibility of parole*. By striking down parolable life as a constitutional sentence for juvenile homicide offenders, the majority substitutes what the law actually requires with what the majority believes it should require, impermissibly usurping the Legislature's role in making the policy decisions of this state. And, given the majority's expansion of *Miller* to 18-year-olds in *Parks*, it may only be a matter of time before the majority further expands the class of defendants who may not be sentenced to parolable life.

In *People v Taylor*, a bare majority of this Court conjures a presumption against life without parole for juveniles convicted of first-degree murder and imposes a burden on the prosecution to rebut this presumption

[66] *People v Poole*, 510 Mich 851 (2022).

by clear and convincing evidence.[67] This brazen rewrite of the statute, enacted by the Legislature post-*Miller* to govern the procedures for sentencing juvenile homicide offenders, will drastically limit the discretion sentencing courts have traditionally held to impose a sentence on a defendant convicted of committing one of our state's most serious crimes.[68]

Finally, in *People v Boykin*, the majority requires trial courts to consider the mitigating qualities of youth when sentencing a defendant to a term of years under MCL 769.25 or MCL 769.25a, despite no constitutional, statutory, or precedential basis to do so.[69] By creating this new rule, the majority invades the role of the Legislature, ignoring the policy choices it made in enacting MCL 769.25 and MCL 769.25a.[70]

Each of these cases, standing alone, represents a significant departure from our jurisprudence in this area of the law. But taken as a whole, a bare majority of this Court (in all of the cases but *Boykin*) has dramatically rewritten the sentencing laws applicable to young people who commit society's most heinous crimes. Defining crime and fixing punishment is emphatically a legislative task,[71] in that it presents profound questions of policy and moral judgment best left for the Legislature to establish, not for a slim majority

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[67] *People v Taylor*, 510 Mich 112; 987 NW2d 132 (2022).

[68] See *id*. at 150 (VIVIANO, J., dissenting, joined by ZAHRA and CLEMENT, JJ.).

[69] *People v Boykin*, 510 Mich 171; 987 NW2d 58 (2022).

[70] See *id*. at 202. (ZAHRA, J., dissenting, joined by VIVIANO, J.).

[71] See *United States v Wiltberger*, 18 US (5 Wheat) 76, 95; 5 L Ed 37 (1820) ("[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

of this Court to prescribe by judicial fiat.[72] As Michigan's court of last resort, it is critically important that we honor and respect the separation of constitutional powers and limit the exercise of our judicial power to simply state what the law requires and not discern what the law *should* be in light of competing policy considerations. That is a duty constitutionally reserved for the Legislature: the state's elected government body representing the will of the people. This Court undoubtedly has the final word on the constitutionality of a particular sentence, but by failing to check its judicial power and simply state what the law is, the majority denies the Legislature and the people who elect our legislative representatives their rightful constitutional authority to determine the punishment for a particular crime.

VI. CONCLUSION

Although defendant is ineligible for the constitutional relief articulated in *Miller* and *Montgomery* and falls outside the purview of the Michigan Legislature's chosen *Miller* remedy, the Court has inappropriately used its judicial power to fashion a remedy for defen-

[72] See *Gregg v Georgia*, 428 US 153, 175; 96 S Ct 2909; 49 L Ed 2d 859 (1976) (opinion by Stewart, J.) ("In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.") (brackets, quotation marks, and citation omitted); *Harmelin*, 501 US at 962 (opinion by Scalia, J.) ("[T]he length of the sentence actually imposed is purely a matter of legislative prerogative.") (quotation marks and citation omitted); *id*. at 998 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts.") (quotation marks and citation omitted).

dant that, before today, never existed in Michigan law. Put simply, the majority opinion's erroneous application of the *Lorentzen/Bullock* factors leads it to the flawed conclusion that parolable life sentences are categorically disproportionate for juvenile homicide offenders under Const 1963, art 1, § 16. The law does not require this result, and the majority's mistaken belief that it does invades the province of the Legislature by displacing its quintessential role of fixing punishment.[73] Because the majority opinion affords defendant relief from an otherwise constitutionally proportionate sentence, I dissent.

VIVIANO (except as to footnote 9) and CLEMENT (except as to footnotes 24 and 25), JJ., concurred with ZAHRA, J.

VIVIANO, J. (*dissenting*). To reach the merits of the constitutional issue raised by defendant concerning cruel or unusual punishment, the majority first holds that defendant has satisfied the procedural requirements to file a successive motion for relief from judgment. I disagree with that conclusion. I do not believe defendant has overcome the procedural bar to filing a successive motion for relief from judgment and write to explain why I believe it is unnecessary to even reach the merits of defendant's motion.

Defendant, who pleaded guilty to two counts of second-degree murder, had previously filed motions for relief from judgment prior to filing the motion at issue in this case. Therefore, he must satisfy the procedural requirements of MCR 6.502(G), which bars successive

[73] See *State v Soto-Fong*, 250 Ariz 1, 10; 474 P3d 34 (2020) ("[C]ourts that have held de facto juvenile life sentences unconstitutional provide a cautionary tale, as they have invariably usurped the legislative prerogative to devise a novel sentencing scheme . . . .").

motions for relief from judgment unless certain exceptions apply. At the time defendant filed his motion for relief from judgment, MCR 6.502(G) stated:

> (1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.
>
> (2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.[1]

In his current motion for relief from judgment, defendant argued, *inter alia*, that his sentences violate the Eighth Amendment pursuant to *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (holding that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments' "), and *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016) (applying *Miller* retroactively). He claimed these decisions were retroactive changes in law that allowed him to file a successive motion for relief from judgment. The trial court denied his motion, acknowledging that *Montgomery* held that *Miller* applies retroactively but

[1] MCR 6.502, as amended June 2, 1995, 449 Mich xciii (1995). This provision of the court rule has since been amended twice. Neither of these amendments are relevant for purposes of this appeal.

explaining that *Miller* is not applicable to cases involving juveniles sentenced to life with the possibility of parole. Because *Miller* and *Montgomery* were inapplicable to defendant, the trial court declined to review his claims under the principles announced in those cases. Without expressly stating that the trial court erred in its analysis of MCR 6.502(G)(2), the Court of Appeals indicated that defendant's reliance on *Miller* and *Montgomery* "tenuously" satisfied the procedural requirement to allow him to file a successive motion for relief from judgment. *People v Stovall*, 334 Mich App 553, 561; 965 NW2d 264 (2020). It proceeded to address the merits of his motion, concluding that the trial court did not abuse its discretion in denying defendant's motion.

The majority in this Court holds that defendant's motion was "based on a retroactive change in law," such that it satisfied MCR 6.502(G)'s procedural bar. The majority adopts the reasoning of Justice CLEMENT's concurring statement in *People v Manning*, 506 Mich 1033, 1038 (2020) (CLEMENT, J., concurring), holding that the change in law need only serve as a "foundation" or "base" for the defendant's claim. Justice CLEMENT's concurrence noted that *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the verb "base" as: "1: to make, form, or serve as a base for 2: to find a base or basis for—usu[ally] used with *on* or *upon*" and that *Black's Law Dictionary* (11th ed) similarly defines "base," in relevant part, as "[t]o make, form, or serve as a foundation for . . . ." *Manning*, 506 Mich at 1038 (CLEMENT, J., concurring).

I do not disagree with the definition of "base" that the majority applies today and that Justice CLEMENT applied in *Manning*. Rather, I disagree with how the majority applies that definition to defendant's motion for relief from judgment. Reliance on a clearly inapplicable holding—

such as the holdings of *Miller* and *Montgomery* to a defendant sentenced to life with the possibility of parole—is not a true basis or a foundation; rather, it is an illusory anchor point.[2] The majority's interpretation of MCR 6.502(G)(2) elevates form over substance, allowing a defendant to satisfy the procedural requirements simply by citing a case with retroactive effect in a motion for relief from judgment, regardless of whether the caselaw relied on actually entitles the defendant to any relief.

Federal caselaw regarding the proper interpretation of the federal statutes governing habeas corpus review provides some helpful insight. Under 28 USC 2244(b)(2), a claim presented in a second or successive habeas corpus application must be dismissed unless the applicant meets certain criteria, one of which is that "the applicant [must] show[] that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" 28 USC 2244(b)(2)(A). If a three-judge panel of the appropriate court of appeals is satisfied that the prisoner's application has made a prima facie showing that one of the exceptions to the general rule against second or successive habeas corpus applications applies, it may allow the prisoner to file an application or motion in the district court. 28 USC 2244(b)(3)(B) and (C); 28 USC 2255(h).[3]

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[2] The majority itself acknowledges that defendant's sentence does not run afoul of *Miller* and *Montgomery*, going so far as to say that *Montgomery* explicitly tells us that defendant's challenge under the Eighth Amendment must fail. *Ante* at 313.

[3] 28 USC 2244 applies to state prisoners, while 28 USC 2255 provides a similar procedure for federal prisoners who seek to have their sentences vacated or set aside. Although 22 USC 2255(h) does not contain the "relies on" language found in 28 USC 2244(b)(2), it contains an express reference to 28 USC 2244, and federal appellate courts have

There is currently a split among the United States Courts of Appeals with respect to what "relies on" means for purposes of habeas corpus applications. See generally Means, Federal Habeas Manual, § 11:36 (May 2022 update). The Third Circuit has taken the most liberal approach, permitting a nonfrivolous extension of a rule to be certified, while leaving the ultimate decision on the merits for the district court. See *In re Hoffner*, 870 F3d 301, 308 (CA 3, 2017) (holding that "whether a claim 'relies' on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis"). However, even the Third Circuit's approach is not without limitations. The rule relied upon need not "conclusively decide[]" the movant's claim, but it must "substantiate[] the . . . claim." *Id*. at 309 (quotation marks and citation omitted; first alteration in original). And while the movant can argue for a nonfrivolous extension of the rule, the "requested extension . . . cannot be so facially implausible that he is not really 'relying' on the new rule at all." *Id*. at 311 (quotation marks and citation omitted).[4]

Other circuits have taken a narrower approach. In particular, the United States Court of Appeals for the Eighth Circuit has rejected the argument that a movant can seek an extension of a new rule. In *Donnell v United States*, 826 F3d 1014, 1016 (CA 8, 2016), it explained:

> A claim "relies on" a new rule when it is 'based on' a new rule . . . . A claim is truly "based on" a new rule only when the new rule recognizes the right asserted. See *Webster's*

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generally found that the "relies on" language applies to motions brought under 28 USC 2255. See, e.g., *In re Hoffner*, 870 F3d 301, 307 & n 9 (CA 3, 2017); *Donnell v United States*, 826 F3d 1014, 1016 (CA 8, 2016).

[4] The United States Court of Appeals for the Ninth Circuit, relying extensively on *In re Hoffner*, also found that requests for nonfrivolous extensions satisfy the "relies on" requirement. See *Henry v Spearman*, 899 F3d 703, 706 (CA 9, 2018).

> *Third New International Dictionary* 180 (defining "base" as "the fundamental part of something: ESSENCE, FOUNDATION"). Where a claim depends on recognition of a second new rule, the claim is best understood as relying on that second rule for a grant of relief.

I find the analysis in *Donnell* to be particularly persuasive, especially because the Eighth Circuit understood "relies on" to mean the same thing as "based on," that latter term being at issue in MCR 6.502(G)(2). The relief defendant requested in his motion does not depend on recognition of the rule announced in *Miller* and made retroactive in *Montgomery*. Rather, it depends on a rule that even the majority agrees is not found in those cases. The rule that the majority relies on to grant defendant relief was not in existence at the time defendant filed his motion. This fact is obvious, as it is in this very case that the Court has created a new rule that a parolable life sentence for a juvenile who commits second-degree murder violates our state Constitution.

I fear that the majority's interpretation of the court rule will incentivize criminal defendants to file increasingly meritless successive motions for relief from judgment, which will further burden our already backlogged trial courts. See *People v Anderson*, 508 Mich 971, 972 (2021) (VIVIANO, J., dissenting) (acknowledging the backlog of cases due to the COVID-19 pandemic). Unlike even the most generous interpretations of the federal habeas corpus statutes, the majority has imposed no discernable limitation on how tangential a case may be to the relevant new rule or how great of an extension would be necessary in order for a defendant to be entitled to relief. As a result, the trial courts will struggle to apply the majority's holding and, undoubtedly, much unwarranted postjudgment litigation will ensue.

I would deny leave to appeal under MCR 6.502(G). But even if defendant could overcome the procedural bar, I would conclude that his constitutional argument fails for the reasons stated by Justice ZAHRA. I therefore join Justice ZAHRA's dissent in every respect other than footnote 9.[5] For these reasons, I dissent.

CLEMENT, J. (*dissenting*). I join Justice ZAHRA's dissent except for footnotes 24 and 25 and except insofar as it conflicts with my opinion in *People v Boykin*, 510 Mich 171, 199-201; 987 NW2d 58 (2022) (CLEMENT, J., concurring in part and dissenting in part).

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[5] Because the rest of my colleagues have reached this question, it is appropriate for me to likewise indicate my view. See *In re Certified Questions*, 506 Mich 332, 414 & n 21; 958 NW2d 1 (2020) (VIVIANO, J., concurring in part and dissenting in part).

JORDAN v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 162485. Argued on application for leave to appeal May 4, 2022. Decided July 28, 2022.

Helen Jordan, a nurse who was formerly employed by the predecessor to the Department of Health and Human Services, challenged in the Michigan Compensation Appellate Commission (MCAC) the decision of a magistrate that she was not entitled to disability benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. In 1995, plaintiff was working for defendant's predecessor when she was injured during an altercation with a patient. Plaintiff was prescribed opioid medication to treat leg and back pain that she said resulted from the 1995 injury, and she used the opioid medication continuously after the incident and became dependent upon it. Plaintiff began receiving disability benefits under the WDCA in 1996. In 2015, plaintiff underwent an independent medical examination at defendant's request pursuant to MCL 418.385. The doctor who conducted the examination concluded that any disability experienced by plaintiff was not the result of the 1995 incident, and defendant subsequently discontinued plaintiff's benefits. Plaintiff applied for reinstatement of her benefits under the WDCA. The magistrate concluded that plaintiff's loss of wage-earning capacity was not related to her 1995 work injury but to her opioid dependency and denied plaintiff's claim. Plaintiff appealed the magistrate's decision in the MCAC, and the MCAC reversed, concluding that plaintiff's opioid use was directly traceable to treatment for the work-related injury, so she was entitled to benefits. Defendant appealed by leave granted in the Court of Appeals. The Court, MARKEY, P.J., and GADOLA, J. (METER, J., dissenting), reversed the decision of the MCAC. 335 Mich App 57 (2020). Plaintiff applied for leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other action. 508 Mich 951 (2021).

In a unanimous per curiam opinion, the Supreme Court *held*:

The record was too incomplete to facilitate meaningful appellate review. MCL 418.301(4)(a) defines disability as (1) "a limita-

tion of an employee's wage earning capacity in work suitable to his or her qualifications and training," (2) "resulting from a personal injury or work-related disease." The magistrate found that plaintiff was not entitled to benefits, and the MCAC reversed, but in doing so, the MCAC did not explain what the factual support was for finding that plaintiff was disabled—either by referring to the magistrate's findings or to its own review of the record. Rather, the MCAC concluded, citing the opinions of the parties' respective vocational experts, that plaintiff's opioid use was directly traceable to ameliorating her symptoms from the 1995 injury. Despite the MCAC's conclusion, whether the experts agreed that plaintiff had a limitation of her wage-earning capacity in work suitable to her qualifications and training was not clear from the record. Defendant's vocational expert testified that an opioid addiction would be an impediment to the jobs he located, while plaintiff's vocational expert opined that plaintiff was unemployable due to her use of opioids. However, the MCAC concluded that plaintiff's opioid use precluded her from the workforce without explaining whether it found that the experts' views were equivalent or whether they could be reconciled. The MCAC also did not support its conclusion that any limitation of plaintiff's wage-earning capacity "result[ed] from a personal injury or work-related disease" with factual findings, either its own, or those of the magistrate. While the MCAC has independent authority to perform its own fact-finding under MCL 418.861a(14), it did not purport to find additional facts beyond those in the magistrate's opinion but instead concluded that the magistrate's decision violated existing caselaw. However, the magistrate did not make sufficient factual findings for either the MCAC or the judiciary to determine whether there was legal error in its determination that plaintiff was no longer entitled to benefits. As a result, the Court of Appeals erred by deciding this case as a matter of law because further administrative proceedings were needed.

Decisions of the Court of Appeals and the MCAC vacated; case remanded to the Workers' Disability Compensation Appeals Commission (the commission) for further proceedings.

Justice VIVIANO, concurring, wrote separately to explain his view that on remand the commission or the magistrate should consider whether plaintiff had an affirmative duty to seek reasonable treatment for her opioid addiction, and if so, whether her failure to do so broke the chain of causation such that her opioid addiction was no longer traceable to her 1995 workplace injury. As early as 2000, plaintiff's doctors discussed drug detoxification

with her and advised her that her chronic pain was due, in part, to opioid dependency. Secondary injuries that occur in the quasi-course of employment are compensable, but the chain of causation for such injuries can be broken by the claimant's intentional conduct. And when there are two injuries, as in this case (i.e., plaintiff's 1995 workplace injury and the opioid addiction), there generally must be a causal connection between the two. Arguably, a claimant's refusal to seek necessary medical treatment to regain wage-earning capacity breaks the necessary causal chain and renders the claimant ineligible for compensation. This conclusion depends, in part, on whether a claimant has a duty to seek or accept treatment. The WDCA creates such a duty in certain circumstances, and this Court has previously found that a claimant has a duty to make themselves whole before the employer must pay workers' compensation benefits. Further, if the commission or the magistrate concluded on remand that plaintiff remained disabled because of her opioid use, the magistrate or the commission would still need to determine whether the opioid addiction, a secondary injury, is traceable to plaintiff's 1995 workplace injury. If plaintiff was instructed by medical professionals to seek rehabilitation for her opioid dependency but refused, this could break the causal chain such that her current addiction should no longer be considered traceable to her original injury. On remand, therefore, the commission or magistrate should consider whether plaintiff had a duty to seek treatment for her addiction and how such a duty affected whether her loss of wage-earning capacity was traceable to her workplace injury. Further, because the issue of opioid addiction implicates important policy concerns that are suited for the Legislature, not the courts, Justice VIVIANO noted that the Legislature might want to consider specifically addressing it.

Justice BERNSTEIN, concurring, agreed fully with the majority, but wrote separately because neither the relevant statute nor the relevant administrative rules provide sufficient instruction regarding how to properly adjudicate the case. Justice BERNSTEIN also expressed concern that holding employers responsible for paying these costs could have devastating consequences for small businesses, who represented 99% of Michigan employers, and he urged the Legislature to consider solutions that would adequately balance the interests of employees who developed long-term work-related disabilities with those of small businesses that might ultimately bear the responsibility of associated costs. The language of the WDCA does not make it clear who should be responsible for the payment of benefits in situations like the present one, in which an employee is injured at work and becomes

disabled for decades as a result of the medical treatment of the initial workplace injury. The Workers' Disability Compensation Agency amended its rules in 2015 to reflect that reimbursement for opioid treatment is only available when the treatment is prescribed within 90 days after onset of the injury, with limited exceptions. Presumably, these amendments reflected some intent by the WDCA to minimize the amount of WDCA compensation available for opioid prescriptions, but they still do not address whether long-term wage loss stemming from treatment of a workplace injury with opioids is compensable through the WDCA. Because neither the WDCA nor the administrative rules indicate whether the employee, the employer, or the state is responsible for lost wages in a situation like the present one, there was no way to fairly allocate such costs. Therefore, the Legislature should provide further guidance about how these costs should be allocated.

Justice CAVANAGH, joined by Justice WELCH, concurring, agreed with the majority that a remand to the commission for additional factual findings was necessary for judicial review, but wrote separately to describe why the factual findings of the magistrate and the MCAC were insufficient and to provide guidance as to the factual findings required on remand. In order to resolve the case, the MCAC needed to make factual findings as to (1) whether plaintiff's opioid treatment was reasonable and necessary to treat her work-related injury when she began treatment in 1995 and (2) whether that opioid treatment resulted in a disability in 2015, either due to continued opioid treatment to treat pain caused by the work-related injury or due to an opioid addiction that developed because of treatment for the work-related injury. The magistrate and the MCAC erred by focusing only on plaintiff's condition in 2015 and not assessing how the work-related injury and any reasonable and necessary treatment for the injury contributed to a disability in 2015. A key issue was whether plaintiff suffered a disability in 2015 that was traceable to the work-related injury, but the magistrate's decision assumed that if plaintiff was no longer suffering the effects of the injury in 2015, then she was not entitled to benefits regardless of whether her opioid use was reasonable and necessary to treat the work-related injury before 2015 and this use resulted in a disability. Because of this assumption, the magistrate did not assess the treatment for plaintiff's injury in 1995 and instead limited her inquiry to the source of plaintiff's alleged disability in 2015. In reversing the MCAC, the Court of Appeals agreed with the magistrate, but both tribunals misapplied the traceability analysis. Traceability does not necessarily require that one continue to suffer the effects of

the work-related injury when seeking benefits. Rather, it requires only that the disability follows as a sequence and natural result of the original injury, and a disabling drug addiction that occurs because of reasonable and necessary treatment for a work-related injury could satisfy this standard. It was necessary to look beyond the cause of plaintiff's pain in 2015 and to determine whether there was a sufficient causal connection between the treatment for the work-related injury and her 2015 disability. Under the relevant caselaw, there would have been a sufficient causal connection if opioids were a reasonable and necessary treatment for plaintiff's work-related injury in 1995 and that treatment resulted in a disability, either because the opioids were still a reasonable and necessary treatment for plaintiff in 2015 or because plaintiff became addicted to opioids, which rendered her disabled in 2015. On this record, the judiciary could not determine whether the commission legally erred and misapplied the traceability analysis without explicit factual findings as to the efficacy, necessity, and effect of the opioid treatment for plaintiff's work-related injury.

Cooper, Bender & Bender, PC (by *Jacob C. Bender*) for Helen Jordan.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher M. Allen*, Assistant Solicitor General, and *Brian S. Galin* and *Jason Hawkins*, Assistant Attorneys General, for the Michigan Department of Health and Human Services.

PER CURIAM. Plaintiff in this matter asserts that she suffered an injury at work, that she was prescribed opioid painkillers as part of her treatment for that injury, that she is now dependent on those painkillers, that the painkillers render her unemployable, and that she is therefore eligible to receive disability benefits. Defendant disputes plaintiff's claims that she is unemployable and eligible for disability benefits. A magistrate held that plaintiff was ineligible for benefits, the Michigan Compensation Appellate Commission (MCAC) reversed that decision, and the Court of Ap-

peals reversed the MCAC.[1] We conclude that the record in this matter is too incomplete to facilitate meaningful appellate review and that the Court of Appeals erred by adjudicating this case as a matter of law rather than remanding for factual development. We therefore vacate the opinion of the Court of Appeals and remand to the commission for further proceedings.

Plaintiff, Helen Jordan, was formerly a nurse employed by what was at the time known as the Department of Mental Health, working at the Hawthorn Center in Northville. On October 3, 1995, she was involved in an altercation with a patient at the facility; the patient pulled her hair and sent her to the ground. Thereafter, she complained of various pains in her back and legs, which she said resulted from the incident and left her unable to work. Several physicians attempted a variety of treatments, including back surgery, but none resolved her issues, and she did not return to work. Her physicians also prescribed opioid pain medication, which she used continuously thereafter and is now dependent upon. She began receiving benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., in 1996.

In 2015, defendant, Department of Health and Human Services—the successor to plaintiff's former state government employer—asked that she submit to an independent medical examination under MCL 418.385. She did, and was examined by Dr. Philip Mayer on February 27, 2015. He concluded that any disability she faced "is not the result of any anatomic pathology caused by the incident of occurrence dating back to October 3, 1995." Defendant then discontinued

[1] This body has since been renamed the Workers' Disability Compensation Appeals Commission by Executive Reorganization Order No. 2019-3. See MCL 125.1998.

plaintiff's benefits. Thereafter, plaintiff applied for reinstatement of her benefits, alleging that she "sustained a severe and disabling injury to her lumbar spine during patient restraining" and that she "seeks all benefits pursuant to the WDCA."

Under the WDCA, "upon the filing . . . of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable," and "[a] worker's compensation magistrate shall hear a case that is set for hearing." MCL 418.847(1). Plaintiff testified, and the parties also submitted opinions from their respective medical and vocational experts. After reviewing the testimony, the magistrate's "Findings of Fact and Conclusions of Law" framed the dispute in these terms:

> It is undisputed that plaintiff sustained an injury to her back on October 3, 1995 while restraining a patient. It is also undisputed that plaintiff was paid worker's disability compensation payments from the date of injury in 1995 until 2015. The issue therefore is not whether plaintiff was disabled from the initial injury on October 3, 1995 but whether she continues to be disabled from the 1995 injury.

After reviewing the evidence, the magistrate concluded that "plaintiff's loss of wage earning capacity is not related to her 1995 work injury but to her opioid dependency." As a result, she denied plaintiff's claim for benefits.

After this adverse decision, plaintiff sought review before the MCAC as provided by MCL 418.859a(1). In its review, the commission faulted the magistrate's decision as a matter of law, holding "that her conclusion flies in the face" of *Staggs v Genesee Dist Library*, 197 Mich App 571; 495 NW2d 832 (1992). It concluded that plaintiff's "opioid use is directly traceable to

ameliorating the well documented symptoms incurred from the work incident in October of 1995" and that "the opioid prescriptions were reasonable and necessary on this particular record," meaning that "plaintiff is entitled to benefits pursuant to the reasoning of *Staggs*." At that point, it was defendant's turn to appeal, and after granting its application for leave to appeal, the Court of Appeals reversed. *Jordan v Dep't of Health & Human Servs*, 335 Mich App 57; 966 NW2d 162 (2020). The majority concluded that *Staggs* was inapplicable because plaintiff's "use of opioids was part of ongoing treatment over several years and because this case concerns whether [plaintiff] was entitled to continue receiving benefits in 2015[; therefore,] the injury-treatment examination must be viewed under the circumstances that existed in 2015." *Id*. at 72. It ultimately held that *Staggs* was distinguishable and that plaintiff was not entitled to benefits. Plaintiff then appealed in this Court, and we ordered argument on the application. *Jordan v Dep't of Health & Human Servs*, 508 Mich 951 (2021).

We believe that the record in this matter is too incomplete to facilitate meaningful appellate review. Cf. *Woody v Cello-Foil Prods (After Remand)*, 450 Mich 588; 546 NW2d 226 (1996). The WDCA defines a disability as (1) "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training," (2) "resulting from a personal injury or work-related disease." MCL 418.301(4)(a). Here, the magistrate denied benefits to plaintiff and the MCAC reversed, but in doing so, the MCAC did not explain what the factual support was for finding that plaintiff is disabled—either by referring to the magistrate's findings or its own review of the factual record. Rather, the MCAC concluded:

> Inasmuch as plaintiff's vocational expert, Mr. James Fuller, and defendant's vocational expert, Mr. John Stokes, agree that plaintiff's opioid use precludes her from the workforce, we conclude that plaintiff is disabled because of said opioid use. Because the opioid use is directly traceable to ameliorating the well documented symptoms incurred from the work incident in October of 1995, we further conclude that plaintiff is entitled to benefits pursuant to the reasoning of *Staggs*, supra.

Looking first to whether it was established that the plaintiff had "a limitation of . . . wage earning capacity in work suitable to . . . her qualifications and training," MCL 418.301(4)(a), despite the MCAC's conclusion, whether the experts agreed on this point is not apparent from the record. The magistrate concluded on this point: "Mr. Fuller testified that plaintiff's use of narcotics would render her unemployable with no vocational options and no wage earning capacity. Mr. Stokes agreed plaintiff's use of opioids would be an impediment to the jobs he located." While the MCAC may have implicitly equated Mr. Stokes's conclusion that plaintiff's use of opioids was an impediment to the jobs he found with Mr. Fuller's conclusion that plaintiff's opioid use rendered her unemployable with no vocational options and no wage-earning capacity, the MCAC did not state this explicitly. Instead, the MCAC concluded that the experts agreed that plaintiff's opioid use precludes her from the workforce, without explaining whether the experts' conclusions were equivalent or could be reconciled.

The second issue is whether any limitation in plaintiff's wage-earning capacity "result[s] from a personal injury or work-related disease." MCL 418.301(4)(a). Even assuming there was factual support for finding a limitation of wage-earning capacity in work suitable to plaintiff's qualifications and training, the MCAC did

not support its conclusion that any limitation here "result[ed] from a personal injury or work-related disease." The MCAC concluded that "the opioid use is directly traceable to ameliorating the well documented symptoms incurred from the work incident in October of 1995," but did not support this conclusion with factual findings, either those made by the magistrate or pursuant to its own review of the record.

In light of these deficiencies, we believe that the magistrate's decision is too incomplete to perform effective appellate review, and it would be inappropriate for the judiciary to attempt to infer factual findings. Of course, this Court held in *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000), that the MCAC has independent authority to perform its own fact-finding under MCL 418.861a(14). Therefore, it may well have been able to address these problems with the magistrate's decision. However, it did not purport to find other facts and instead confined itself to holding that the magistrate's decision ran afoul of *Staggs* as a matter of law. In this case, the magistrate did not make sufficient findings for either the MCAC or the judiciary to determine whether there was legal error in its determination that plaintiff was no longer entitled to benefits, and the MCAC did not supplement those deficient findings.

We conclude, then, that the combination of the decisions of the magistrate and the MCAC are too incomplete to facilitate meaningful appellate review. The magistrate's decision was insufficient for either the MCAC or the judiciary to determine "whether it understood the applicable legal standard and what facts it specifically relied upon in reaching its conclusion," *Gacioch v Stroh Brewery Co*, 426 Mich 612, 620; 396 NW2d 1 (1986), and the MCAC did not supplement

those deficient findings. As a result, the Court of Appeals erred by deciding this case as a matter of law; what is needed instead are further administrative proceedings. Because "[f]indings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law," Const 1963, art 6, § 28, we make no factual findings of our own. Rather, we vacate the decisions of the Court of Appeals and the MCAC and remand to the administrative process to fill in these gaps.[2] In light of our holding in *Mudel* that the commission has the authority to perform independent fact-finding, we remand to the commission without prejudice to it exercising its prerogative to remand to the magistrate under MCL 418.861a(12).

MCCORMACK, C.J., and ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, CAVANAGH, and WELCH, JJ., concurred.

VIVIANO, J. (*concurring*). I agree with the Court's decision to clarify the record and the bases for the administrative decision below. I write separately to explain my view that an important issue in this case, which should be considered on remand, is whether plaintiff had an affirmative duty to seek reasonable treatment for her opioid addiction and, if so, whether the failure to do so broke the chain of causation such that her ongoing opioid addiction is no longer traceable to her 1995 workplace injury. I further believe that the difficult and complicated issue of opioid addiction in

[2] Although Justices VIVIANO and CAVANAGH offer opinions on the issues that should be considered on remand, we reiterate that today, all we are requiring is that the commission or the magistrate create a factual record that better supports a holding either that plaintiff is or is not entitled to continued WDCA benefits for the reasons stated in this opinion.

workers' compensation claims could benefit from consideration by the Legislature.[1]

As the majority explains, plaintiff has consistently been prescribed opioids since 1995 to treat back and leg pain after a workplace injury.[2] However, as early as 2000, plaintiff's doctor, Dr. Edward Washabaugh of the Michigan Pain Institute, discussed her drug dependency with her. He noted that her chronic pain was due, in part, to narcotic dependency and discussed drug detoxification with her. Thereafter, it appears that there were "many discussions" with plaintiff about "opioids management and dependency." In 2016, Dr. Philip Mayer, who conducted an independent medi-

[1] This case is only one manifestation of a much larger public health crisis that our nation is facing involving the misuse of opioids. According to the Centers for Disease Control and Prevention (CDC), from 1999 to 2019 nearly 500,000 people died from an opioid overdose. See CDC, *Understanding the Epidemic* <https://www.cdc.gov/drugoverdose/epidemic/index.html> (accessed July 20, 2022) [https://perma.cc/3X68-XY2P]. That number continues to increase at an alarming rate, with an estimated 100,306 drug overdose deaths in the United States during the 12-month period ending in April 2021, an increase of 28.5% from the same period the year before. See CDC, Press Release, *Drug Overdose Deaths in the US Top 100,000 Annually* (November 17, 2021) (accessed July 20, 2022), available at <https://www.cdc.gov/nchs/ pressroom/nchs_press_releases/2021/20211117.htm> [https://perma.cc/T5G3-22CS].

[2] As the CDC website explains, the rise in opioid-overdose deaths has occurred in three waves, beginning with the increased prescription of opioids in the 1990s. *Understanding the Epidemic* <https://www.cdc.gov/drugoverdose/epidemic/index.html>. Then, in 2010, there was a rapid increase in overdose deaths involving heroin. *Id*. The third wave, which began in 2013, has involved significant increases in overdose deaths involving synthetic opioids, particularly those involving illicitly manufactured fentanyl. *Id*. Like many other national, state, and local public health agencies, the CDC's efforts to combat the opioid epidemic include "enhancing linkage to care for people with opioid use disorder and risk for opioid overdose . . . ." *Id*.

cal examination of plaintiff, recommended that plaintiff undergo a "medically supervised drug detoxification program" to wean her from her narcotic opioid dependence and to improve the "subjective perception of [her] symptoms and quality of life."

After defendant halted plaintiff's benefits in 2015, plaintiff applied for the reinstatement of her benefits. In 2017, the magistrate denied plaintiff's request, finding that the loss of plaintiff's wage-earning capacity was not related to her workplace injury but to her opioid dependency. The Michigan Compensation Appellate Commission (the MCAC)[3] reversed that decision, holding that under *Staggs v Genesee Dist Library*, 197 Mich App 571, 576; 495 NW2d 832 (1992), plaintiff's "opioid use is directly traceable" to her work injury. The Court of Appeals disagreed, finding that *Staggs* was distinguishable because it involved a one-time treatment and arguing that the MCAC improperly "gave no weight" to the magistrate's finding that "there was no longer a traceable connection between the opioid treatment and the work-related injury." *Jordan v Dep't of Health & Human Servs*, 335 Mich App 57, 71-73; 966 NW2d 162 (2020).

Like Justice BERNSTEIN, I am not unsympathetic to plaintiff's plight. Through no apparent fault of her own, she apparently became addicted to opioids that were prescribed to her for treatment of her workplace injury more than 25 years ago. But an argument could be made that a claimant in plaintiff's circumstances has an affirmative duty to seek treatment for his or her addiction and that the failure to do so should result in

[3] The MCAC has since been renamed the Workers' Disability Compensation Appeals Commission.

the denial of workers' compensation benefits.[4] As Professor Larson explained in his treatise, though secondary injuries, like plaintiff's opioid addiction, that occur in the "quasi-course of employment" are compensable, the chain of causation for these injuries can be broken by intentional conduct by the claimant. 1 Larson, Larson, & Robinson, Larson's Workers' Compensation Law, § 10.05 (2015). In other words, the necessary "linkage between the disabling work-related injury and the reduction in pay" can be broken by the claimant's conduct. *Sweatt v Dep't of Corrections,* 468 Mich 172, 186; 661 NW2d 201 (2003) (plurality opinion). And where, as here, there are two injuries—i.e., the original back injury and the subsequent opioid addiction—there generally must be a causal connection between the two. See *Staggs*, 197 Mich App at 576; see also *Crawley v Gen Motors Truck Corp*, 259 Mich 503, 505; 244 NW 143 (1932) (explaining that for a secondary injury to entitle a claimant to compensation, "there must appear some causal connection between it and the first injury" such that "the original injury [was] a causal factor in producing the second injury").

In cases like the present, therefore, it could be argued that the refusal to seek necessary medical services to regain wage-earning capacity breaks the necessary causal link and renders the claimant ineligible for compensation. In such circumstances, it could be contended that the plaintiff's loss of wage-earning capacity (and the secondary injury precluding such

[4] There are many inpatient and outpatient therapy programs dedicated to the treatment of people with substance addiction, including programs that use medications to help patients transition from physical dependence on opioids. See, e.g., Johns Hopkins Medicine, *Treating Opioid Addiction* <https://www.hopkinsmedicine.org/opioids/treating-opioid-addiction.html> (accessed July 20, 2022) [https://perma.cc/SHK2-PP97].

capacity) would no longer be traceable to the workplace injury. Thus, although opioid dependence, for example, could otherwise be causally related to a workplace injury, that causal connection might be broken if the claimant refuses treatment of the dependency.[5]

This conclusion depends, in part, on whether the claimant has a duty to seek or accept treatment. The Michigan Worker's Disability Compensation Act, MCL 418.101 *et seq*., indicates that, at least in certain circumstances, there is such a duty. The act states that "[i]f there is an unjustifiable refusal to accept rehabilitation pursuant to a decision of the director, the director shall order a loss or reduction of compensation . . . ." MCL 418.319(1);[6] see also *Sweatt*, 468 Mich at 185 (plurality opinion) (noting that employees are not entitled to benefits if they unjustifiably refuse to rehabilitate themselves, refuse surgery, or "refuse[] to

[5] Justice CAVANAGH's partial dissent suggests that any duty to rehabilitate is irrelevant here because plaintiff had a legal prescription for opioids. I question whether following any legally obtained pharmaceutical prescription, without more, absolves a claimant of this duty. For example, in a case like the present one, it seems to me that the factfinder should weigh the conflicting advice to seek treatment of her addiction that the claimant received from other, nonprescribing doctors. Moreover, even legally obtained prescriptions may come from dubious sources, such as so-called "pill mills" that "prescrib[e] or dispens[e] controlled prescription drugs inappropriately." Rigg, March, & Inciardi, *Prescription Drug Abuse & Diversion: The Role of the Pain Clinic*, 40 J Drug Issues 681 (2010).

[6] This statute covers both medical and vocational rehabilitation services and allows an employer to move for the director to order "training, services, or treatment" to "render the employee fit for a remunerative occupation." MCL 418.319(1). Such services or treatment may also be requested by the employee, carrier, or upon the motion of the director. *Id*. It appears, therefore, that this statute would allow the employer to request, and the director to order, addiction treatment or services, the refusal of which would result in a "loss or reduction of compensation." *Id*.

undertake exercises designed to hasten recovery"). And this Court has previously found that before requiring an employer to compensate a workers' compensation claimant, " 'the claimant should first discharge the primary duty owing to himself and society to make use of every available and reasonable means to make himself whole.' " *Myers v Wadsworth Mfg Co*, 214 Mich 636, 644; 183 NW 913 (1924); quoting *Kricinovich v American Car & Foundry Co*, 192 Mich 687, 691; 159 NW 362 (1916).

If, on remand, the commission or the magistrate concludes that plaintiff remains disabled because of her opioid use, it would still need to be determined whether the opioid addiction, a secondary injury, is traceable to plaintiff's 1995 workplace injury. If plaintiff was instructed by medical professionals to seek rehabilitation for her opioid dependency but refused, in my view, this could break the causal chain such that her current addiction should no longer be considered traceable to her original injury. I therefore believe the commission or the magistrate should consider this question on remand.

As Justice BERNSTEIN's concurrence demonstrates, this issue is rife with policy concerns that are suited for the Legislature, not the courts. In this regard, it is worth noting that legislative and administrative bodies in other states have adopted rules to address the problem of long-term opioid use in workers' compensation cases. See, e.g., *Johnson v Darchuks Fabrications, Inc*, 963 NW2d 227, 229 (Minn, 2021) (explaining that the Minnesota Legislature directed the Minnesota Department of Labor and Industry to develop rules and treatment parameters for long-term use of opioid medication in workers' compensation cases); *Forte v Muccini,* 181 App Div 3d 1135, 1137; 121 NYS3d 395 (2020)

(explaining that the New York Workers' Compensation Board had set forth a protocol for opioid weaning for patients who had used opioids for a long period of time to transition them to new standards of care). As Justice BERNSTEIN notes, though the Michigan Workers' Disability Compensation Agency amended its rules in 2015 to only reimburse physicians for opioid treatment prescribed within 90 days after onset of injury except for extensions under very narrow circumstances, see Mich Admin R 418.101008; Mich Admin R 418.101008a; Mich Admin R 418.101008b, these amendments do not address claims of plaintiffs who were prescribed and became addicted to opioids through long-term prescription use before 2015. Consequently, there is no legislative or regulatory guidance concerning a potentially large class of cases.

This case presents a difficult issue. On remand, the commission should consider whether plaintiff had a duty to seek treatment for her addiction, as this might bear upon whether her loss of wage-earning capacity is traceable to her workplace injury. Because this issue implicates important policy concerns, the Legislature might want to consider specifically addressing it. In light of these considerations, I concur.

BERNSTEIN, J. (*concurring*). I concur fully with the majority opinion. But I write separately because neither the language of the relevant statutes nor the language of the applicable administrative rules provides sufficient instruction about how to properly adjudicate this issue. Further, I believe this case highlights a massive problem that has the potential to create a financial catastrophe for employees and employers alike. I am particularly worried about small businesses, which make up over 99% of the employers in Michigan. See United States Small Business Admin-

istration Office of Advocacy, *2021 Small Business Profile: Michigan* (August 30, 2021), available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30142526/Small-Business-Economic-Profile-MI.pdf> (accessed June 5, 2022) [https://perma.cc/2LUN-HWZZ]. I urge the Legislature to consider statutory solutions that would adequately balance the interests of employees who develop long-term work-related disabilities and the small businesses that may ultimately bear the responsibility of associated costs, especially since statutory language may not put anyone on notice of the true extent of this burden.

The Michigan Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., provides a system to compensate employees for medical costs and lost wages if they either sustain personal injuries at work or exacerbate preexisting conditions because of their work. MCL 418.301. To make sure employees receive due compensation, almost every employer in the state is subject to the provisions of the WDCA. MCL 418.111. To comply with the WDCA, employers may choose to purchase insurance or seek approval from the Workers' Disability Compensation Agency to self-insure. MCL 418.611. Even though a robust WDCA insurance industry exists in Michigan, one of the factors that goes into premium-setting is the loss experience, or the amount of payouts employers have made to cover their previous WDCA costs. MCL 500.2312. In other words, the compensation Michigan employees receive for their workplace injuries affects insurance costs for *all* Michigan employers. This is particularly problematic when, like here, WDCA payments may be necessary for years or even decades after the workplace injury occurred because of the medical treatment provided.

Plaintiff was employed by the state of Michigan in 1995 when she alleges she was injured at work. She began to receive WDCA benefits shortly after her injury. Those benefits continued for more than 20 years because her 1995 injury was treated continuously and with increasing dosages of opioids. Plaintiff had no history of opioid use before she was prescribed opioids to treat her workplace injury, and there was no evidence she ever used opioids without a prescription. Yet plaintiff became disabled from this opioid use, receiving $153.83 in wage-loss benefits each week for more than two decades after her injury.

I doubt that plaintiff is the only employee whose workplace injuries have led to disability, the use of opioids, and the subsequent receipt of long-term WDCA benefits. In the 1990s, upon receiving reassurance from pharmaceutical companies that prescription opioids were not addictive, medical professionals relied heavily on prescribing opioids for pain management. National Institute on Drug Abuse, *Opioid Overdose Crisis* (March 11, 2021) <https://nida.nih.gov/research-topics/opioids/opioid-overdose-crisis> (accessed June 6, 2022) [https://perma.cc/PNT3-ZWQL]. Although there has been a reduction in opioid prescription over time, from 2012 through 2017, more than 7.5 million Michigan patients were treated with prescription opioids. Michigan Department of Licensing and Regulatory Affairs and Appriss Health, *Statewide Opioid Assessment: Michigan* (March 29, 2018), p 6, available at <https://www.michigan.gov/-/media/Project/Websites/lara/bpl/MAPS/Statewide-Opioid-Assessment-Michigan.pdf> (accessed June 5, 2022) [https://perma.cc/R49C-YKW7]. Despite claims from pharmaceutical companies that opioids were not addictive, it is estimated that about 8% to 12% of chronic opioid users develop an opioid-use disorder. Vowles et al, Abstract, *Rates of*

Opioid Misuse, Abuse, and Addiction in Chronic Pain: A Systematic Review and Data Synthesis, 156 Pain (No. 4) 569 (2015). The high number of Michiganders prescribed opioids combined with the addictive nature of those substances have created the perfect storm for circumstances like these to be widespread. It is unclear how many Michiganders were prescribed opioids who now suffer from debilitating long-term opioid dependency as a direct result of workplace injuries, but it seems likely that plaintiff is far from the only one.

Plaintiff's condition is highly sympathetic. She was injured at work and has suffered from the effects of the treatment of her initial workplace injury for decades. With this remand, we ask the Workers' Disability Compensation Appeals Commission for further factual findings that will determine whether plaintiff is entitled to continued WDCA benefits. However, whether plaintiff is entitled to such continued benefits is a difficult question given the lack of statutory clarity.

The language of the WDCA does not make it clear who should be responsible for the payment of WDCA benefits when a situation like plaintiff's develops. For injuries sustained at work, the WDCA currently requires reimbursement for (1) a "personal injury . . . [that] causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury" and (2) "[m]ental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, . . . if contributed to or aggravated or accelerated by the employment in a significant manner." MCL 418.301(1) and (2). "Mental disabilities are compensable if arising out of actual events of

employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality." MCL 418.301(2). But these definitions are hardly helpful guidance in understanding who is responsible for compensating employees who sustain *years* of lost wages resulting from the treatment of their workplace injuries.

Moreover, in 2015, the Workers' Disability Compensation Agency amended their payment rules to reflect that reimbursement is only available for opioid treatment prescribed within 90 days after the onset of injury, except for certain extensions granted under very narrow circumstances. Mich Admin R 418.101008; Mich Admin R 418.101008a; Mich Admin R 418.101008b. At least one study has shown that this was associated with a reduction in the number of opioids that patients were prescribed through WDCA claims. Michigan Department of Licensing and Regulatory Affairs, *Study Shows Michigan has Largest Opioid Decrease in Work Comp* (June 28, 2017) <https://www.michigan.gov/opioids/nel/panel-news/news/study-shows-michigan-has-largest-opioid-decrease-in-work-comp> (accessed July 12, 2022) [https://perma.cc/GB2U-VGS8]. These amendments reflect some intent to minimize the amount of WDCA compensation available for opioid prescriptions. However, these administrative rules still do not address the core issue in this case—whether decades of wage loss stemming from the treatment of a workplace injury with opioids is compensable through the WDCA.

In sum, neither the WDCA nor the administrative rules indicate whether the employee, the employer, or the state is responsible for wages lost due to long-term opioid treatment stemming from an initial workplace injury. Without such clarity, there is no way to deter-

mine how to allocate these costs fairly. Certainly, an employee who, through no fault of their own, has a diminished or lost capacity to work for years or decades because of a medical treatment stemming from a workplace injury needs to be able to support themselves. However, if employers may be responsible for paying hundreds of dollars toward wage loss each week for decades, I fear that the lack of clarity regarding how to equitably allocate costs could have devastating consequences for any small business that must either pay those costs outright or endure the high cost of WDCA insurance premiums.

The opioid epidemic is real. The consequences are, and will continue to be, wide-reaching. The Legislature is in the best position to determine the needs of both employers and employees affected by this crisis and should provide further guidance about how these costs should be allocated.

CAVANAGH, J. (*concurring*). I agree with the majority that a remand to the Michigan Compensation Appellate Commission (the MCAC)[1] for additional factual findings is necessary to enable effective judicial review. I write separately to describe in greater detail why the factual findings of the magistrate and the MCAC were insufficient and to provide guidance as to what factual findings are required on remand. Specifically, in order to resolve this case I believe the MCAC must make factual findings as to (1) whether plaintiff's opioid treatments were reasonable and necessary to treat her

[1] This body has since been renamed the Workers' Disability Compensation Appeals Commission. For ease of reference, I nonetheless refer to the body as the MCAC throughout this opinion.

work-related injury[2] when she began treatment in 1995, and (2) whether that opioid treatment resulted in a disability in 2015, either due to continued opioid use to treat pain caused by the work-related injury or due to an opioid addiction that developed because of treatment for the work-related injury.

In my view, the magistrate and the MCAC erred in focusing only on plaintiff's condition in 2015 and not assessing how the work-related injury—and any reasonable and necessary treatment for that injury—contributed to a disability in 2015. As noted in the magistrate's opinion, the parties stipulated that "plaintiff's personal injury arose out of and in the course of employment," but the parties disputed whether "plaintiff's disability is *due* to the alleged personal injury." Magistrate's Opinion (June 22, 2017) at 2 (emphasis added). In other words, the key issue here—as framed by the parties—is whether plaintiff suffered a disability in 2015 that was "traceable" to the work-related injury. See *Crawley v Gen Motors Truck Corp*, 259 Mich 503, 505; 244 NW 143 (1932) (holding that a plaintiff may recover benefits if a current injury causing a disability is "traceable" to the original injury).

In concluding that plaintiff was not entitled to continue receiving workers' compensation benefits in 2015, the magistrate appeared to find that plaintiff was no longer suffering any effects from the work-related injury in 2015 and that plaintiff was disabled due to her opioid addiction. Further, it was undisputed that plaintiff was prescribed opioids for the first time in 1995 after the work-related injury and that she was

[2] For the purpose of concision, I will frequently refer to plaintiff's injury that directly resulted from her 1995 work accident as her "work-related injury."

prescribed them continuously through 2015. Thus, implicit in the magistrate's decision is the assumption that if plaintiff no longer suffered the effects of the work-related injury in 2015, she was not entitled to benefits, regardless of whether her opioid use was reasonable and necessary to treat the work-related injury *before* 2015 and that use resulted in a disability. In light of this assumption, the magistrate found it unnecessary to assess the treatment for plaintiff's work-related injury *in 1995* and limited her inquiry to the source of plaintiff's alleged disability in 2015.

In reversing the decision of the MCAC, the Court of Appeals majority agreed with the magistrate that if plaintiff was no longer suffering the effects of the work-related injury, she was necessarily not entitled to workers' compensation benefits. *Jordan v Dep't of Health & Human Servs*, 335 Mich App 57, 72; 966 NW2d 162 (2020) ("The properly framed question is whether Jordan's opioid use in 2015, i.e., the treatment at the time her benefits were halted, was in response or traceable to the 1995 work-related injury, but only to the extent that the effects of that injury still existed in 2015 when she was still being prescribed the opioids. Without this linkage, Jordan would simply be a patient receiving opioid medication for back and leg pain unassociated with a work-related injury."). The Court of Appeals further held that the connection between plaintiff's drug addiction and her work-related injury was too tenuous to support recovery of workers' compensation benefits. *Id*. at 73. I believe that both the magistrate and the Court of Appeals misapplied the traceability analysis to these facts.

In reaching its holding, the Court of Appeals acknowledged its prior decision in *Staggs*, in which the Court held that "where the reasonable treatment of a

work-related injury results in disability, the injured employee is entitled to benefits, even if the underlying injury did not itself result in that disability." *Staggs*, 197 Mich App at 576. It distinguished this case from *Staggs*, noting that *Staggs* involved a one-time treatment while plaintiff here received ongoing treatment. *Jordan*, 335 Mich App at 71-72. The Court of Appeals concluded that because plaintiff was receiving ongoing treatment, she would only be entitled to benefits if she was still suffering the effects of the work-related injury when she sought continued benefits in 2015. *Id*. at 72.

But *Staggs* contains no such limitation. Instead, *Staggs* recognized that a disability must be "traceable" to a work-related injury to be compensable and held that a disability is "traceable" if it occurs because of reasonable and necessary treatment for that work-related injury. *Staggs*, 197 Mich App at 575; see also *Cook v Charles Hoertz & Son*, 198 Mich 129, 130-131; 164 NW 464 (1917) (holding that one who suffered an injury after falling off of crutches prescribed due to a work-related injury was entitled to benefits where he was not violating physicians' orders or behaving negligently). "Traceability" does not *necessarily* require that one continue to suffer the effects of the work-related injury when seeking benefits. Rather, it requires only that the disability "follows as a sequence and natural result of the original injury." *Crawley*, 259 Mich at 505. And, contrary to the analysis of the Court of Appeals, a disabling drug addiction that occurs because of reasonable and necessary treatment for a work-related injury could satisfy this standard. See *Sweet v Capital Area Transp Auth*, 2006 ACO 258.[3]

[3] This is especially true in the context of opioids, which are widely known to be highly addictive and lead to a dependency that is difficult to overcome. See generally Mayo Clinic, *How Opioid Addiction Occurs*

Therefore, plaintiff would be entitled to benefits if she took opioids as a reasonable and necessary treatment in response to the work-related injury and that treatment resulted in a disability in 2015, regardless of whether the initial injury persisted at that time.

Justice VIVIANO suggests that plaintiff may have had a duty to obtain treatment for her opioid addiction and that, if she was advised to seek such treatment but failed to do so, any resulting disability may not be "traceable" to the work-related injury. I do not disagree with the general proposition that a claimant has some obligation to mitigate the severity of an injury that occurs from a work-related injury, and I agree that a claimant's failure to seek treatment for opioid addiction *could* be relevant to whether their disability is traceable.[4] But it appears that any such duty would not be relevant in this case, given that plaintiff began using opioids for the first time in 1995 pursuant to a *legal prescription from a doctor* and continued receiving prescriptions for opioids through 2015. It is her

<https://www.mayoclinic.org/diseases-conditions/prescriptions-drug-abuse/in-depth/how-opioid-addiction-occurs/art-20360372#:~:text=Opioids%20are%20highly%20addictive%2C%20in,powerful%20senseof%20well-being> (accessed July 21, 2022) [https://perma.cc/X4PK-AY3G]; Kosten & George, *The Neurobiology of Opioid Dependence: Implications for Treatment*, Science & Practice Perspectives (July 2002), pp 13-20, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2851054/> (accessed July 21, 2022) [https://perma.cc/W7RK-T3XE].

[4] However, I would note that opioid addiction is commonly known to be difficult to overcome, see note 3 of this opinion, so I am not convinced that the existence of a long-term addiction, even combined with medical advice to get treatment, would *necessarily* be sufficient to render a disability not traceable. Moreover, this potential duty to mitigate would seemingly be accounted for in some respects by the requirement that a treatment that causes a disability be "reasonable and necessary." It is difficult to see how a claimant would have a duty to stop receiving treatment that is reasonable and necessary to treating a work-related injury.

legal opioid use (or perhaps the addiction arising from her legal use) that allegedly rendered plaintiff unemployable in 2015. See *Cook*, 198 Mich at 131. I acknowledge, as recognized by the concurrences of Justice BERNSTEIN and Justice VIVIANO, that there are currently well-known public health risks related to opioid use that doctors and policymakers must be mindful of when determining whether opioid treatments are appropriate. But I would not suggest that the MCAC should fault plaintiff for following doctor's orders, nor would I place a duty on her to discontinue a treatment that has been consistently recommended by medical professionals.

Thus, to determine whether plaintiff was entitled to benefits in 2015, it is necessary to look beyond what was causing her pain in 2015 and to determine whether there was a sufficient causal connection between the treatment for the work-related injury and a disability in 2015. There would be a sufficient causal connection under *Staggs* if opioid medication was a reasonable and necessary treatment for plaintiff's work-related injury in 1995 and if that treatment resulted in a disability in 2015, either because that opioid use itself was disabling and remained reasonable and necessary to treat the work-related injury in 2015 or because that opioid use resulted in a disabling opioid addiction that persisted in 2015. While the magistrate appears to have concluded that plaintiff was no longer experiencing the effects of the work-related injury in 2015, she did not make the necessary factual findings as to the efficacy, necessity, and effect of the opioid treatment for the work-related injury in 1995.

When reviewing the decision of the magistrate, the MCAC correctly recognized that the magistrate erred

by failing to apply *Staggs* on these facts.[5] But, as noted by the majority, the MCAC did not purport to contradict the factual findings of the magistrate or find additional facts to support its conclusion as to traceability. While the judiciary's role in reviewing the MCAC's factual findings is extremely limited, see *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703; 614 NW2d 607 (2000), we clearly have the authority to review "questions of law" embedded in a final decision of the MCAC. MCL 418.861a(14). In order to exercise that authority, there must be sufficient factual findings for the judiciary to properly resolve any "questions of law" implicated in a decision by the MCAC. And I agree with the majority that, given the judiciary's limited role related to the factual findings of the MCAC, "it would be inappropriate for the judiciary to attempt to infer factual findings." *Ante* at 378.

In this case, the judiciary cannot determine whether the MCAC legally erred and misapplied the traceability analysis without explicit factual findings as to the efficacy, necessity, and effect of the opioid treatment for plaintiff's work-related injury. For these reasons, I concur with the Court's decision to remand to the

[5] The MCAC is required to defer to the factual findings of the magistrate, but it is not required to defer to the magistrate on issues of law. Compare MCL 418.861a(3) (requiring deference to the magistrate's "findings of fact" if they are "supported by competent, material, and substantial evidence on the whole record") with MCL 418.861a(11) (providing the MCAC the authority to review, on the request of the parties, "conclusions of law" embedded in a magistrate's decision).

MCAC, and I encourage the MCAC on remand to make the pertinent factual findings stated in this opinion.[6]

WELCH, J., concurred with CAVANAGH, J.

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[6] I agree with the majority that the MCAC has the authority to perform independent fact-finding on remand, *Mudel*, 462 Mich at 714, and that it "*may* remand" to the magistrate "if it is determined that the record is insufficient for purposes of review." MCL 418.861a(12) (emphasis added). However, I emphasize that the MCAC "is not *required* to remand a case to the magistrate" just because "the magistrate has failed to make full factual findings." *Mudel*, 462 Mich at 711. Rather, the MCAC may make its own findings without a remand if it "is presented with a record that allows it to intelligently make its own factual findings . . . ." *Id*.

ROUCH WORLD, LLC v DEPARTMENT OF CIVIL RIGHTS

Docket No. 162482. Argued March 2, 2022. Decided July 28, 2022.

Rouch World, LLC, and Uprooted Electrolysis, LLC, brought an action in the Court of Claims against the Department of Civil Rights and its director, seeking, among other relief, a declaratory judgment that the prohibition of sex discrimination in places of public accommodation under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., did not bar discrimination based on sexual orientation or gender identity. The owners of Rouch World had denied a request to host the same-sex wedding of Natalie Johnson and Megan Oswalt at their facility, claiming that doing so would violate their religious beliefs. The owner of Uprooted Electrolysis had denied hair-removal services to Marissa Wolfe, a transgender woman, on the same basis. Johnson, Oswald, and Wolfe filed complaints with the Department of Civil Rights, which had issued an interpretive statement in 2018 indicating that the ELCRA's prohibition against discrimination based on sex included sexual orientation and gender identity. The Department of Civil Rights opened an investigation into both of these incidents, but the investigations were stayed when plaintiffs brought this action. Defendants moved for summary disposition under MCR 2.116(C)(8). The Court of Claims, CHRISTOPHER M. MURRAY, J., concluded that it was bound to follow *Barbour v Dep't of Social Servs*, 198 Mich App 183 (1993), which had relied largely on then-current federal precedent regarding analogous provisions of Title VII of the Civil Rights Act, 42 USC 2000e *et seq*., to conclude that the ELCRA's discrimination prohibition did not encompass sexual orientation. The Court of Claims therefore denied defendants' motion for summary disposition as applied to plaintiff Rouch World's arguments. However, because *Barbour* did not concern gender-identity discrimination, the Court of Claims ruled that when a person discriminates against someone who identifies with a gender different than that assigned at birth, then that is dissimilar treatment on the basis of sex and is prohibited under the ELCRA. In so concluding, the Court of Claims relied, in part, on the United States Supreme Court decision in *Bostock v Clayton Co*, 590 US ___, ___; 140 S Ct 1731

(2020), wherein the Court held that an employer violates Title VII when it intentionally fires a person on the basis of their homosexuality or transgender identity because doing so necessarily involves discrimination based on sex. Accordingly, the Court of Claims granted defendants' motion for summary disposition as to plaintiff Uprooted Electrolysis's arguments. Defendants filed an interlocutory application for leave to appeal in the Court of Appeals, challenging the rejection of summary disposition as to Rouch World. Defendants then filed a bypass application in the Supreme Court, which granted the application to address "whether the prohibition on discrimination 'because of . . . sex' in the [ELCRA] applies to discrimination based on sexual orientation." 507 Mich 999 (2021).

In an opinion by Justice CLEMENT, joined by Chief Justice MCCORMACK and Justices BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court *held*:

Discrimination on the basis of sexual orientation necessarily constitutes discrimination because of sex. Accordingly, the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" on the basis of sexual orientation constitutes discrimination "because of . . . sex" and, therefore, constitutes a violation of the ELCRA under MCL 37.2302(a). The Court of Appeals' decision in *Barbour* was overruled, and the Court of Claims' decision with respect to Rouch World was reversed.

1. The ELCRA provides in MCL 37.2302(a) that except where permitted by law, a person shall not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. In *Barbour*, the Court of Appeals held that the ELCRA did not encompass sexual-orientation discrimination, and it based this decision on federal cases holding, with regard to Title VII, that Congress's intent in prohibiting discrimination because of sex was to place women on an equal footing with men rather than to regulate discrimination based on sexual orientation. Since the Court of Appeals decision in *Barbour*, the cases on which that Court relied were overturned in *Bostock*, 590 US ___; 140 S Ct 1731. In *Bostock*, the United States Supreme Court considered whether discrimination based on sexual orientation or gender identity was encompassed by Title VII's prohibition of employee discharge because of sex. The Court proceeded on the assumption that "sex" referred only to

biological distinctions between male and female. Next, the Court noted that it had previously defined "because of" as meaning "by reason of" or "on account of," which established a but-for standard of causation. The Court specifically eschewed a definition of discrimination that would require an analysis comparing the employer's differential treatment of employees grouped by protected characteristic rather than individual employees themselves, concluding that the relevant inquiry under Title VII was whether the specific employee was treated differently, not whether the employer treats different groups of persons differently. From these textual assessments, the Court deduced that an employer violates Title VII when it intentionally fires an individual employee based in part on sex. Applying this principle to discrimination on the basis of sexual orientation and gender identity, the Court concluded that it would be impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex—in other words, the Court held that discrimination based on sexual orientation or gender identity is necessarily encompassed within discrimination because of sex.

2. The Michigan Supreme Court has previously held that the operative phrase "because of" in the ELCRA establishes a but-for causation standard. Under this standard, causation is satisfied where sex is a determining factor in the discriminatory action; in other words, causation is established where the discriminatory action would not have occurred but for the sex of the complainant. Accordingly, the question in this case was whether complainants who were denied service because of their sexual orientation would not have been so denied but for their sex. Like its federal counterpart, the ELCRA does not define the term "sex." However, regardless of whether one defines "sex" expansively or narrowly, the result of the textual analysis is the same: discrimination on the basis of sexual orientation necessarily involves discrimination because of sex in violation of the ELCRA, for the persuasive reasons articulated in *Bostock*.

3. Rouch World denied Johnson's request for services related to her wedding with Oswalt. Had Johnson been a man, Rouch World would not have denied its services. In other words, but for Johnson's sex, Rouch World would have rendered its services to Johnson. Although Rouch World's motivation for its denial of services was based on Johnson's sexual orientation, it was nevertheless true that, holding all other facts constant (including the sex of the romantic partner involved), Rouch World discriminated against Johnson because of her sex. Because one's sex is neces-

sary to the identification of sexual orientation, discrimination on that basis is discrimination on the basis of sex. Incorporating an additional consideration—such as the sexual preference of that individual—and retitling that pair of considerations does not remove the effect of sex from the equation. Contrary to the argument put forward by Rouch World, the ELCRA's prohibition of sex discrimination requires a determination whether a specific individual was treated worse than a member of the opposite sex would have been; it does not ask how one sex-based group is treated as compared to another sex-based group. Further, evidence that the 1976 Legislature that enacted the ELCRA intentionally chose to exclude protections from discrimination based on sexual orientation, both at the time of its enactment by declining to include the specific language and repeatedly thereafter, would have been relevant only if the statute were ambiguous. When a statute's language is clear, as it was here, its plain language is the best evidence of its meaning. While the principal evil motivating the 1976 Legislature to prohibit discrimination on the basis of sex may have been the preferential treatment of males to the detriment of females, this motivation does not curtail other applications of the plain statutory language. Both the ELCRA and Title VII have been applied to circumstances likely unanticipated by the enacting Legislature, including pregnancy discrimination, sex-stereotyping cases, same-sex sexual harassment, and retirement accounts. The Legislature's failure to foresee particular statutory applications does not prohibit these applications as long as they are consistent with the plain language of the statute.

Reversed in part and remanded for further proceedings.

Justice ZAHRA, dissenting, took no issue with the merits of the policy adopted by the majority, but stated that under the Michigan Constitution and its separation of powers, it is the ultimate responsibility of the Legislature or the people to write, amend, or repeal the laws, while the Supreme Court's duty is to say what the law is rather than what it ought to be. He stated that the majority's conclusion that the ELCRA prohibits discrimination based on sexual orientation construed "because of . . . sex" to mean something that nobody in 1976 thought it meant, according to lay dictionaries and linguistic evidence of the period, and he noted that none of the entities charged with enforcing the ELCRA understood it to prohibit sexual-orientation discrimination until 2018. The fact that the Legislature specifically and explicitly considered adding sexual orientation to the ELCRA but ultimately chose not to do so materially distinguished this case from *Bostock*, thereby requiring a different outcome. Justice ZAHRA

concluded that the ELCRA's use of "sex" refers to whether one is a biological male or a biological female and that defendants did not prevail under that narrower definition. For these reasons, he would have affirmed the Court of Claims' conclusion that sexual orientation is not a protected class under the ELCRA.

Justice VIVIANO, dissenting, agreed with Justice ZAHRA's conclusion. He wrote separately to state that the majority altered the meaning of the ELCRA by adopting the logic of the but-for test without the need for a defendant to have any discriminatory intent, which did not reflect the ordinary meaning of the statute or the inherently intentional nature of discrimination. He noted that the results would be significant for Michigan, given that the scope of the ELCRA extends beyond the statute at issue in *Bostock* because it covers all employers. Further, it does not appear that the ELCRA contains exemptions for religious organizations similar to those in the statute at issue in *Bostock* or that other statutes offer protections for religious liberty that supersede the ELCRA's requirements. The majority's failure to consider whether its interpretation of the ELCRA violated constitutional protections of religious liberty departed from the principle that courts will first consider whether an interpretation raises grave constitutional doubts before adopting that interpretation, and given that various amici argued that the majority's interpretation would trench on constitutional liberties, the majority should have considered those concerns. Justice VIVIANO would have held that MCL 37.2302(a) does not prohibit discrimination because of sexual orientation and that the ELCRA applies only if a defendant took a prohibited action as a result of a prejudice, bias, animus, or belief with regard to a particular protected characteristic.

1. STATUTES — CIVIL RIGHTS ACT — DISCRIMINATION — SEXUAL ORIENTATION.

A denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service on the basis of sexual orientation constitutes discrimination because of sex for purposes of Michigan's Civil Rights Act, MCL 37.2101 *et seq*. (MCL 37.2302(a)).

2. STATUTES — CIVIL RIGHTS ACT — DISCRIMINATION — SEXUAL ORIENTATION — CAUSATION.

In a case alleging sexual-orientation discrimination under Michigan's Civil Rights Act, MCL 37.2101 *et seq*., causation is established where the discriminatory action would not have occurred but for the sex of the complainant; discrimination on the basis of

sexual orientation necessarily involves discrimination because of sex in violation of the Civil Rights Act.

Great Lakes Justice Center (by *David A. Kallman*, *William R. Wagner*, *Stephen P. Kallman*, *Erin Mersino*, and *Jack C. Jordan*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Tonya Celeste Jeter*, *Ron Robinson*, and *Kyla Barranco*, Assistant Attorneys General, for defendants.

Amici Curiae:

Leah M. Litman, *Daniel T. Deacon*, *Jay D. Kaplan*, and *Daniel S. Korobkin* for the American Civil Liberties Union of Michigan and others.

Gwinn Legal PLLC (by *Daniel A. Gwinn* and *Laura K. Bradshaw-Tucker*) for the Corktown Health Center.

Linus Banghart-Linn, Assistant Solicitor General, for Governor Gretchen Whitmer.

McClelland & Anderson, LLP (by *Melissa A. Hagen* and *Gail A. Anderson*) for Michigan Realtors.

Freid, Gallagher, Taylor & Associates (by *Debra A. Freid*) and *Gafkay Law, PLC* (by *Julie A. Gafkay*) for the Michigan Association for Justice.

Eli Savit, Washtenaw County Prosecutor (by *Eli Savit*, *Victoria Burton-Harris*, and *Christina Hines*); *Robert Steinhoff*, Alger County Prosecutor; *David Leyton*, Genesee County Prosecutor; *Carol A. Siemon*, Ingham County Prosecutor; *Jeffrey S. Getting*, Kalamazoo County Prosecutor; *Matt J. Wiese*, Marquette

County Prosecutor; *Karen McDonald*, Oakland County Prosecutor; and *Kym Worthy*, Wayne County Prosecutor.

Bodman PLC (by *Thomas Van Dusen*, *Thomas J. Rheaume, Jr.*, and *Gordon J. Kangas*) for the Michigan Catholic Conference.

Schiff Hardin LLP (by *Jessica A. Sprovtsoff*, *Jacob K. Danziger*, and *Elise H. Yu*) for various Michigan businesses, organizations, and Chambers of Commerce, and *FGI* (by *Rami D. Fakhoury*) for Dow, Inc.

Angie Martell, *Amanda J. Shelton*, *S. Kerene Moore*, *Donald C. Wheaton, Jr.*, *Christine A. Yared*, and *Alanah M. Haskin* for the LGBTQA Section of the State Bar of Michigan.

John J. Bursch for Alliance Defending Freedom and Michigan Family Forum.

CLEMENT, J. At issue for our consideration is whether the prohibition of discrimination "because of . . . sex" in the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*., encompasses discrimination on the basis of sexual orientation. We hold that it does. Accordingly, we overrule the Court of Appeals decision in *Barbour v Dep't of Social Servs*, 198 Mich App 183, 185; 497 NW2d 216 (1993), and reverse in part the Court of Claims decision below.

I. LEGAL BACKGROUND

This case concerns acts of alleged discrimination investigated by defendant, the Michigan Department of Civil Rights (the MDCR). The MDCR is an administrative agency that serves as the operational arm of the Michigan Civil Rights Commission (the MCRC).

See MCL 16.575 through MCL 16.577. The MCRC is a constitutional body whose purpose is to secure constitutional and statutory guarantees against discrimination and investigate allegations that those guarantees have been violated. Const 1963, art 5, § 29.

Among the legal guarantees against discrimination enforced by the MCRC is the statutory guarantee against discrimination provided by the ELCRA. The ELCRA recognizes as a civil right "[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status . . . ." MCL 37.2102(1). Through the recognition and protection of this civil right, the ELCRA seeks to dismantle "the prejudices and biases borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v C A Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984) (quotation marks and citations omitted).

The ELCRA specifically protects against discrimination in public accommodations[1] as follows:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or

[1] MCL 37.2301(a) defines a "place of public accommodation" as

> a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

> public service because of religion, race, color, national origin, age, sex, or marital status. [MCL 37.2302.]

Pursuant to its role in enforcing the ELCRA, the MCRC in May 2018 offered to the public for guidance its nonbinding interpretation of the practices prohibited by this statutory provision.[2] Specifically, Interpretive Statement 2018-1 opines that the prohibition of discrimination in places of public accommodation "because of . . . sex" in MCL 37.2302(a) includes a prohibition of discrimination on the basis of sexual orientation and gender identity. The MCRC reasoned "that continuing to interpret the protections afforded by the phrase 'discrimination because of . . . sex' more restrictively by continuing to exclude individuals for reasons of their gender identity or sexual orientation, would itself be discriminatory."[3] Pursuant to this interpretation of MCL 37.2302(a), the MCRC through the MDCR

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[2] Interpretive statements issued by the MCRC do not have the force of law. MCL 24.207(h); *Mich Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich 141, 149-150; 289 NW2d 699 (1980). Sometimes referred to as "interpretive rules," these "are statements as to what the agency thinks a statute or regulation means; they are statements issued to *advise* the public of the agency's construction of the law it administers." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 243-244; 501 NW2d 88 (1993) (quotation marks and citation omitted). "The 'pragmatic consequences' of interpretive 'rules' is that they are published as 'declaration[s] of the proper interpretation of the law, and those affected will normally conform, since the regulation provides a practical guide as to how the office representing the public interest in enforcing the law will apply it.' " *Id*. at 244, quoting Schwartz, Administrative Law (2d ed), § 4.6, pp 159-160.

[3] Interpretive Statement 2018-1, p 1, available at <https://www.michigan.gov/-/media/Project/Websites/mdcr/mcrc/interpretive-statements/2018/meaning-of-sex.pdf?rev=c5ef0e9276a44504b857435423cb887c> (accessed June 23, 2022) [https://perma.cc/RX8Y-D2K8].

has since investigated complaints alleging discrimination on account of gender identity and sexual orientation.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case involves two acts of alleged sex-based discrimination investigated by the MDCR pursuant to Interpretive Statement 2018-1. The first involves plaintiff Rouch World, LLC, which operates an event center in Sturgis, Michigan. In April 2019, Natalie Johnson and Megan Oswalt approached Rouch World regarding hosting their same-sex wedding at its facility. Rouch World declined. Its owners, Ben and Jamey Rouch, explained that hosting and participating in a same-sex wedding ceremony would violate their sincerely held religious belief that marriage is a sacred act of worship between one man and one woman. Johnson and Oswalt thereafter filed complaints with the MDCR, wherein they alleged that Rouch World discriminated against them on the basis of sex in violation of the ELCRA.

The second alleged act of sex-based discrimination occurred when plaintiff Uprooted Electrolysis, LLC, denied hair-removal services to Marissa Wolfe, a transgender woman. Sheri Curtice-Young, the owner of Uprooted Electrolysis, perceived the requested services to be centrally connected to Wolfe's transgender identity and asserted that delivering these services would violate her sincerely held religious belief that sex is an immutable gift from God. Wolfe thereafter filed a complaint with the MDCR alleging that Uprooted Electrolysis had discriminated against her on the basis of sex in violation of the ELCRA.

Pursuant to the MCRC's Interpretive Statement 2018-1, the MDCR opened investigations into both of

these incidents. But the investigations were stayed when plaintiffs jointly sued the MDCR and its then director, seeking declaratory and injunctive relief. Specifically, plaintiffs sought a declaratory judgment that sexual orientation and gender identity are not encompassed by the ELCRA's prohibition of sex discrimination in places of public accommodation and an injunction prohibiting the continued investigation of the complaints filed against plaintiffs and the MDCR's continued adherence to Interpretive Statement 2018-1.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8)[4] regarding the interpretation of the ELCRA, and the Court of Claims denied the motion in part and granted it in part. Regarding whether sexual orientation is encompassed by the ELCRA, the Court of Claims determined that it was bound to follow the Court of Appeals decision in *Barbour*, 198 Mich App 183. In *Barbour*, relying largely on then-current federal precedent regarding analogous provisions of Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*., the Court of Appeals concluded that the ELCRA's discrimination prohibition did not encompass sexual orientation. *Id*. at 185. Acknowledging itself bound by this determination from *Barbour*, the Court of Claims here denied defendants' motion for summary disposition as applied to plaintiff Rouch World's arguments.

However, because *Barbour* did not concern gender-identity discrimination, the Court of Claims determined that it was not bound by *Barbour* in regard to plaintiff Uprooted Electrolysis's arguments. The Court of Claims considered the issue and determined that

[4] MCR 2.116(C)(8) provides that a trial court may grant relief to a moving party where "[t]he opposing party has failed to state a claim on which relief can be granted."

when a person discriminates against "someone who 'identifies' with a gender different than the gender that he or she was born as, then that is dissimilar treatment on the basis of sex" as prohibited under the ELCRA. In so concluding, the Court of Claims relied in part on the recent United States Supreme Court decision in *Bostock v Clayton Co*, 590 US ___, ___; 140 S Ct 1731, 1741; 207 L Ed 2d 218 (2020), wherein the Court held that an employer violates Title VII when it intentionally fires a person on the basis of their homosexuality or transgender identity because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Accordingly, the Court of Claims granted defendants' motion for summary disposition as to plaintiff Uprooted Electrolysis's arguments.

Defendants subsequently filed an interlocutory application for leave to appeal in the Court of Appeals, challenging the rejection of summary disposition as to plaintiff Rouch World's sexual-orientation arguments. Shortly thereafter, defendants filed a bypass application in this Court. This Court granted the bypass application to address "whether the prohibition on discrimination 'because of . . . sex' in the [ELCRA] applies to discrimination based on sexual orientation." *Rouch World, LLC v Dep't of Civil Rights*, 507 Mich 999, 999 (2021). Notably, plaintiffs did not cross-appeal the Court of Claims' determination that gender identity is encompassed by the ELCRA—the basis of the complaint against Uprooted Electrolysis—and so that issue is not currently before this Court.[5]

[5] Whether enforcement under the ELCRA for sexual-orientation and gender-identity discrimination would violate plaintiffs' federal and state

III. ANALYSIS

We review de novo both the denial of a motion for summary disposition and questions of statutory interpretation. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). When interpreting a statute, this Court's "primary goal is to ascertain and give effect to the Legislature's intent." *Tomecek v Bavas*, 482 Mich 484, 495-496; 759 NW2d 178 (2008). "[T]he most reliable evidence of that intent is the plain language of the statute." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 528; 734 NW2d 533 (2007) (quotation marks and citations omitted). However, if the statute's language is ambiguous, this Court "may refer to the history of the legislation in order to determine the underlying intent of the Legislature." *Luttrell v Dep't of Corrections*, 421 Mich 93, 103; 365 NW2d 74 (1984). This Court must attempt to avoid any construction that would render portions of a statute

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constitutional religious liberty protections has not yet been adjudicated below and, accordingly, is also not currently before this Court.

Further, this appeal arises from plaintiffs' lawsuit challenging the scope of the protected class of "sex" under the ELCRA, which was filed in response to the MDCR investigation into plaintiffs' alleged denial of a public accommodation. This is not an appeal from the currently stayed investigations of plaintiffs' conduct or any enforcement action that might result from those investigations. Accordingly, the issue before this Court also does not encompass what the MDCR must prove to demonstrate that discrimination on the basis of a protected characteristic was the cause of a denial of a public accommodation or whether the MDCR can carry this burden of proof.

surplusage or nugatory. *South Dearborn*, 502 Mich at 361. Finally, in interpreting the ELCRA specifically, this Court has encouraged using as guidance federal precedent interpreting Title VII of the federal Civil Rights Act, the statute on which the ELCRA was based.[6] See *Radtke v Everett*, 442 Mich 368, 381; 501 NW2d 155 (1993); *Rasheed v Chrysler Corp*, 445 Mich 109, 124 n 20; 517 NW2d 19 (1994) (noting that the ELCRA was "clearly modeled" after Title VII).

A. APPLICABLE CASELAW

Today, this Court is asked to determine whether the ELCRA's prohibition of discrimination "because of . . . sex," MCL 37.2302(a), encompasses discrimination based on sexual orientation. As the Court of Claims recognized, the Court of Appeals previously answered this question in the negative in *Barbour*, 198 Mich App 183. In *Barbour*, the plaintiff was subject to harassment in his workplace on the basis of his perceived sexual orientation. *Id*. at 184. On appeal, the Court of Appeals summarily affirmed the trial court's determination that the ELCRA did not encompass sexual-orientation discrimination on the basis of federal precedent holding the same with regard to Title VII, i.e., *DeSantis v Pacific Tel & Tel Co*, 608 F2d 327 (CA 9, 1979), overruled in part by *Nichols v Azteca Restaurant Enterprises*, *Inc*, 256 F3d 864 (CA 9, 2001); *Williamson v A G Edwards & Sons, Inc*, 876 F2d 69 (CA 8, 1989), overruled by *Horton v Midwest Geriatric*

[6] The two statutes share similar language. Specifically, Title VII prohibits an employer from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin[.]" 42 USC 2000e-2(a)(1). Compare MCL 37.2302(a) (prohibiting discrimination in a place of public accommodation or public service "because of religion, race, color, national origin, age, sex, or marital status").

Mgt, 963 F3d 844 (CA 8, 2020); and *DeCintio v Westchester Co Med Ctr*, 807 F2d 304 (CA 2, 1986). *Barbour*, 198 Mich App at 185-186. In those cases, the federal circuits reasoned that Congress's intent in enacting Title VII—and specifically, its reference to "sex"—was "to place women on an equal footing with men," rather than to regulate discrimination based on sexual orientation. *DeSantis*, 608 F2d at 329 (quotation marks and citation omitted). See also *DeCintio*, 807 F2d at 306. *Barbour* adopted the conclusion of these federal circuits without engaging in its own analysis of the issue under the ELCRA.[7]

Barbour, as a published, post-1990 Court of Appeals opinion, has precedential effect, and the Court of Claims properly recognized below that it was bound by that decision. MCR 7.215(C)(1) and (J)(1). However, this Court is not so bound, and developments in the law since *Barbour* have called into question its validity. Specifically, since the Court of Appeals decision in *Barbour*, the cases on which that Court relied were overturned in *Bostock*, 590 US ___; 140 S Ct 1731. In *Bostock*, the United States Supreme Court considered whether the employee plaintiffs terminated for their sexual orientation or gender identity brought cognizable claims of unlawful discrimination under Title VII.[8] *Id*. at ___; 140 S Ct at 1737-1738. Specifically at

[7] *Barbour* also did not consider whether a later United States Supreme Court decision—*Price Waterhouse v Hopkins*, 490 US 228; 109 S Ct 1775; 104 L Ed 2d 268 (1989) (opinion of Brennan, J.; superseded by statute on other grounds), which held that sex stereotyping falls under Title VII's prohibition of sex discrimination—undermined the analysis employed by the *DeSantis* and *DeCintio* courts.

[8] *Bostock* consolidated three separate Title VII claims. First, Gerald Bostock, a longtime child welfare advocate for Clayton County, Georgia, was terminated for conduct unbecoming a county employee shortly after he began participating in a gay softball league and after community

issue was whether discrimination based on sexual orientation or gender identity is encompassed by Title VII's prohibition of employee discharge "because of such individual's . . . sex." *Id*. at ___; 140 S Ct at 1738.

To begin, the majority examined three distinct portions of the statutory text at hand: the term "sex," the phrase "because of," and the provision's subsequent catchall phrase "or otherwise to discriminate." With regard to defining the term "sex," the employers proposed a definition of "sex" as "status as either male or female [as] determined by reproductive biology," as the term allegedly would have been understood by Congress in 1964 when Title VII was enacted. *Id*. at ___; 140 S Ct at 1739. The employees, on the other hand, argued for a broader definition of the term "sex" that encompassed "at least some norms concerning gender identity and sexual orientation." *Id*. However, "[b]ecause nothing in [the majority's] approach to these cases turn[ed] on the outcome of the parties' debate, and because the employees concede[d] the point for argument's sake," the majority proceeded on the assumption that "sex" referred "only to biological distinctions between male and female." *Id*.

Next, the majority considered the operative phrase of the statute—"because of." The majority noted that it had previously defined this phrase as meaning "by reason of" or "on account of" and as establishing a

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members made disparaging comments about his involvement in the league and his sexual orientation. *Id*. at ___; 140 S Ct at 1737-1738. Second, Donald Zarda, who had worked for several seasons as a skydiving instructor at Altitude Express in New York, was terminated days after mentioning that he was gay. *Id*. at ___; 140 S Ct at 1738. Finally, Aimee Stephens was terminated after informing her employer, R.G. & G.R. Harris Funeral Homes in Garden City, Michigan, that she intended to "live and work full-time as a woman" upon her return from an upcoming vacation. *Id*. Stephens had initially presented as male when she began work with Harris Funeral Homes six years earlier. *Id*.

but-for standard of causation. *Id*. (quotation marks and citation omitted). Under this standard, "causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Id*. The majority acknowledged the breadth of this standard, as multiple but-for causes may exist for any single event, but noted that Congress had chosen this specific language rather than the more limiting language it had used for causation in other statutes. *Id*. Accordingly, this chosen causation standard would prevent an employer from avoiding liability for discriminatory action by merely citing some other, nondiscriminatory factor that contributed to the employment action. *Id*.

The majority next assessed the catchall phrase "or otherwise . . . discriminate against," which appears at the conclusion of the statute's list of prohibited actions. *Id*. at ___; 140 S Ct at 1740. The employers argued that the inclusion of this phrase meant that Title VII prohibits employee discharge only when it involves both a protected characteristic and discrimination. *Id*. The majority again accepted this premise for argument's sake and went on to define "discrimination" as "treating that individual worse than others who are similarly situated." *Id*. In so doing, the majority specifically eschewed a definition of discrimination that would require a group-focused analysis that compares the employer's differential treatment of employees grouped by protected characteristic rather than individual employees themselves. *Id*. The eschewed perspective was seen as inconsistent with Title VII's repeated references to "individuals" rather than groups—i.e., " 'discharge any *individual*,' " " 'otherwise . . . discriminate against any *individual*,' " and " 'because of such *individual's*' " protected characteristic. *Id*., quoting 42 USC 2000e-2(a)(1) (emphasis

added). Given that individual focus, the majority concluded that the relevant inquiry under Title VII is whether the specific employee was treated differently, not whether the employer treats different groups of persons differently. *Bostock*, 590 US at ___; 140 S Ct at 1740.

From these textual assessments, the majority deduced that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Id*. at ___; 140 S Ct at 1741. Applying this principle to discrimination on the basis of sexual orientation and gender identity, the majority concluded:

> [I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as a male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision. [*Id*. at ___; 140 S Ct at 1741-1742.]

In sum, the majority held that discrimination based on sexual orientation or gender identity is necessarily encompassed within discrimination because of sex. See *id*.

The majority further acknowledged that when discrimination on the basis of sexual orientation is at issue, there may be two contributing factors to that discrimination: the individual's sex and the sex to which that individual is attracted. *Id*. at ___; 140 S Ct at 1742. But the fact that the individual's sex is one of the causes of the discrimination—that "but for" the individual's sex, the action would not have occurred—is sufficient to satisfy Title VII; the existence of an additional but-for cause does not eliminate liability. *Id*. Similarly, the fact that the employer may have intended to discriminate on the basis of sexual orientation but not sex does not evade liability because "an employer who discriminates on th[is] ground[] inescapably *intends* to rely on sex in its decisionmaking" because sexual orientation is "inextricably bound up with sex." *Id*. Finally, the majority also rejected the premise that an employer's willingness to discriminate against both male and female employees on the basis of sexual orientation removed Title VII liability. *Id*. Because Title VII requires an individual-based analysis rather than a group-based analysis, its liability is not limited to only employers who treat different groups of employees differently. *Id*. Accordingly, discriminating against individuals of different protected characteristic groups similarly "doubles rather than eliminates Title VII liability." *Id*. at ___; 140 S Ct at 1742-1743.

Bostock was not a unanimous opinion; Justices Alito, Thomas, and Kavanaugh dissented. The dissenting justices argued that the majority had usurped the authority of Congress by essentially rewriting Title VII

to encompass discrimination based on sexual orientation and gender identity. *Id*. at ___; 140 S Ct at 1754-1755 (Alito, J., dissenting); *id*. at ___; 140 S Ct at 1822 (Kavanaugh, J., dissenting). They reasoned that, had Congress intended for sexual orientation and gender identity to be protected by Title VII, it would have used those terms specifically when it enacted the statute. *Id*. at ___; 140 S Ct at 1829-1830 (Kavanaugh, J., dissenting). Instead, however, Congress used the term "sex," which they opined was nearly universally understood in 1964 to refer to biological or anatomical distinctions between male and female and would not have been expected to include sexual orientation or gender identity. *Id*. at ___, ___; 140 S Ct at 1767, 1772 (Alito, J., dissenting). Further, the dissenting justices noted that repeated attempts to amend Title VII to include the specific terms sexual orientation and gender identity had proved unsuccessful. *Id*. at ___; 140 S Ct at 1777-1778 (Alito, J., dissenting); *id*. at ___; 140 S Ct at 1823-1824 (Kavanaugh, J., dissenting). Finally, the dissenting justices challenged the majority's conclusion that discrimination based on sexual orientation and gender identity necessarily entails discrimination based on sex, arguing that sex is distinct from these concepts and that employers who discriminate on the basis of sexual orientation and gender identity may not necessarily intend to discriminate on the basis of sex. *Id*. at ___; 140 S Ct at 1758-1760 (Alito, J., dissenting); *id*. at ___; 140 S Ct at 1828-1829 (Kavanagh, J., dissenting).

In response, the majority reiterated its position that although sexual orientation and gender identity are distinct concepts from sex, discrimination on the basis of the former two concepts necessarily entails discrimination on the basis of the latter. *Id*. at ___; 140 S Ct at 1747 (majority opinion). Accordingly, the majority as-

serted that it was not redefining "sex" to include sexual orientation and gender identity but instead finding that the concepts are inextricably linked. *Id*. That Congress may not have anticipated this exact application of Title VII's prohibition of discrimination on the basis of sex does not prevent that application of unambiguous statutory text.[9] *Id*. at ___, ___; 140 S Ct at 1747, 1750-1751. Demonstrating this principle in exercise, the majority referred to its decision in *Pennsylvania Dep't of Corrections v Yeskey*, 524 US 206, 208; 118 S Ct 1952; 141 L Ed 2d 215 (1998), wherein it determined that the directive in the Americans with Disabilities Act (the ADA) that prohibits public entities from discrimination against disabled individuals applied to prisons, despite Pennsylvania's argument that Congress had not predicted that the ADA would apply to prisoners with disabilities when it enacted the ADA. *Id*. at ___; 140 S Ct at 1751. See also *id*. at ___, ___; 140 S Ct at 1747, 1752 (noting with regard to Title VII specifically that its accepted but likely unanticipated applications include sexual harassment and motherhood discrimination). The majority explained that the application of protective legislation to politically unpopular groups may not have been foreseen by the specific enacting Congress, but refusing to apply a statute on this ground "would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to

[9] The majority also expressed skepticism regarding whether this assertion was true, noting that discrimination claims related to sexual orientation and gender identity were filed nearly immediately after Title VII's passage and that there was public discourse within 10 years of Title VII's passage regarding whether the analogous language of the proposed Equal Rights Amendment would afford protections to homosexual persons. *Id*. at ___; 140 S Ct at 1750-1751.

the benefit of the law's terms." *Id*. at ___; 140 S Ct at 1751. Further, to the extent that the dissenting justices argued that Congress's failure to enact amendments to Title VII that would specifically include sexual orientation and gender identity was probative of Congress's intent that "sex" did not include these concepts, the majority noted that "no authoritative evidence" exists explaining why Congress failed to adopt such amendments here. *Id*. at ___; 140 S Ct at 1747.[10] Without such evidence, only speculation remains, and "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." *Id*., quoting *Pension Benefit Guaranty Corp v LTV Corp*, 496 US 633, 650; 110 S Ct 2668; 110 L Ed 2d 579 (1990).

In sum, *Bostock* held that Title VII's prohibition of employee discharge "because of such individual's . . . sex" necessarily encompasses discriminatory employer action on the basis of sexual orientation and gender identity. In so holding, *Bostock* overruled lower federal precedent that had previously held to the contrary, including *DeSantis*, *Williamson*, and *DeCintio*—the cases on which the Michigan Court of Appeals relied in *Barbour*.

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[10] The majority provided multiple reasons why subsequent Congresses might have failed to enact such amendments:

> Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. [*Id*.]

B. ELCRA ANALYSIS

Given *Barbour*'s limited independent analysis and the overruling of the federal precedent it relied on in *Bostock*, as well as the new rule of federal law adopted in *Bostock*, we find it appropriate to now consider whether the ELCRA encompasses discrimination on the basis of sexual orientation.

Section 302 of the ELCRA prohibits the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . sex . . . ." MCL 37.2302(a). This Court has previously held that the operative phrase "because of" in the ELCRA establishes a but-for causation standard. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 606; 886 NW2d 135 (2016). See also *The American Heritage Dictionary of the English Language* (5th ed) (defining "because of" as "[o]n account of; by reason of"). Under this standard, causation is satisfied where sex is "a determining factor" in the discriminatory action. *Matras v Amoco Oil Co*, 424 Mich 675, 682-683; 385 NW2d 586 (1986). In other words, causation is established where the discriminatory action would not have occurred but for the sex of the complainant. See *id*. See also *Radtke*, 442 Mich at 379 ("[T]he essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex."). Accordingly, we must answer here whether complainants who were denied service because of their sexual orientation would not have been so denied but for their sex.

Like its federal counterpart, the ELCRA does not define the term "sex."[11] Drawing from contemporary and historical dictionaries, the parties and amici propose varying definitions of the term "sex" and encourage this Court to affirmatively endorse one definition or another. Plaintiff Rouch World and certain amici propose a narrower definition of "sex" that defines the word as "whether one is a biological male or biological female"; but defendants and other amici propose a more expansive definition that incorporates physiological, structural, and behavioral characteristics. However, like our counterparts at the United States Supreme Court, we conclude that choosing between these definitions is not necessary here because the result of our textual analysis is the same regardless of whether we adopt a narrower or more expansive definition of the term "sex." Accordingly, for the sake of argument, we use but do not affirmatively rule in favor of the more restrictive definition.

Using this more restrictive definition of the term "sex" and applying the but-for causation standard to the provision at hand, we conclude that discrimination on the basis of sexual orientation necessarily involves discrimination because of sex in violation of the ELCRA. In so doing, we find persuasive *Bostock*'s application of Title VII's but-for standard. While we are encouraged but not bound to consider persuasive Title VII federal caselaw, *Radtke*, 442 Mich at 381-382, we find that *Bostock* offers a straightforward analysis of

[11] The ELCRA does specify that "[d]iscrimination because of sex includes sexual harassment," MCL 37.2103(i), and that the term "sex" "includes, but is not limited to, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth that does not include nontherapeutic abortion not intended to save the life of the mother," MCL 37.2201(d). But neither of these provisions offers an exclusive definition of the term "sex."

the plain meaning of analogous statutory language and we agree with its reasoning.[12] A discriminator's choice to "[d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations," on the basis of that

[12] Plaintiff Rouch World emphasizes that this Court is not bound to interpret the ELCRA in the same manner as the United States Supreme Court has interpreted Title VII, and that this Court has, in fact, previously criticized such reliance. For example, in *Haynie v Dep't of State Police*, 468 Mich 302, 320; 664 NW2d 129 (2003), this Court applied the ELCRA's prohibition of sexual harassment differently than United States Supreme Court precedent regarding the prohibition of sexual harassment under Title VII. In so doing, this Court opined that "[w]e cannot agree that any time the Michigan Legislature creates a law that is 'similar' to a federal law, it must be made identical, and the two laws must be interpreted to mean exactly the same thing." *Id*. We further recognized that "the Michigan Legislature is allowed to determine for itself the extent to which it wishes to track the language of the federal law" and that differences between the statutory language may counsel against applying Title VII precedent to our state law. *Id*. As applied in *Haynie*, the fact that the ELCRA specifically provides a statutory definition of sexual harassment merited a divergence from federal precedent concerning Title VII, whose prohibition of sexual harassment is derived from its general prohibition of sex discrimination. *Id*. at 321-322.

Our agreement with *Bostock* today is not at odds with *Haynie* or *Haynie*'s criticism of blindly applying federal caselaw to state statutory provisions. Unlike the statutory language at issue in *Haynie*, the Michigan Legislature here chose to enact language nearly identical to that in Title VII. Compare 42 USC 2000e-2(a)(1) (prohibiting an employer from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin") with MCL 37.2302(a) (prohibiting discrimination in a place of public accommodation "because of religion, race, color, national origin, age, sex, or marital status"). To the extent that the ELCRA encompasses more activity than Title VII in that it applies to discrimination in public accommodations generally rather than solely in employment, nothing about this breadth of application changes the meaning of the operative words "because of . . . sex" that are found in both statutes. The Michigan Legislature's choice to use the language of Title VII counsels in favor of the persuasive value of that caselaw, and, as expressed earlier, we find this caselaw consistent with our own plain-language interpretation of the ELCRA.

individual's sexual orientation is action that is dependent upon the individual's sex under MCL 37.2302(a). Sexual orientation is "inextricably bound up with sex," because a person's sexual orientation is generally determined by reference to their own sex. *Bostock*, 590 US at ___; 140 S Ct at 1742. For example, attraction to females in a fellow female is considered homosexual, while the same trait in a male is considered heterosexual; the sex of the individual at issue is necessary to determine their sexual orientation. To discriminate on the basis of sexual orientation, then, also requires the discriminator to intentionally treat individuals differently because of their sex.[13]

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[13] Moreover, discrimination on the basis of sexual orientation also necessarily entails discrimination on the basis of sexual stereotypes. As the United States Court of Appeals for the Second Circuit explained, "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . The gender stereotype at work here is that 'real' men should date women, and not other men[.]" *Zarda v Altitude Express, Inc*, 883 F3d 100, 121 (CA 2, 2018) (quotation marks and citation omitted). See also *Equal Employment Opportunity Comm v R G & G R Harris Funeral Homes*, 884 F3d 560, 576 (CA 6, 2018); *Hively*, 853 F3d at 346-347 (noting that homosexual women "represent[] the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): [they are] not heterosexual"). Accordingly, discrimination on the basis of sexual orientation signals that individuals who transgress stereotypes associated with their sex are not welcome in the public square. In a plurality opinion, the United States Supreme Court recognized that this type of discrimination also runs afoul of Title VII, reasoning that

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " [*Price Waterhouse*, 490 US at 251, quoting *Los Angeles Dep't of Water &*

Here, plaintiff Rouch World denied female complainant Johnson's request for services related to her wedding with female complainant Oswalt. Had Johnson instead been a male, Rouch World would not have denied its services. In other words, but for Johnson's sex, Rouch World would have rendered its services to Johnson. Although Rouch World's motivation for its denial of services was based on Johnson's sexual orientation, it is nevertheless true that, holding all other facts constant (including the sex of the romantic partner involved), Rouch World discriminated against Johnson because of her sex.[14] Where the discriminator tolerates certain characteristics in one sex but not the other, discrimination on the basis of sex has occurred. *Id*. at ___; 140 S Ct at 1737 ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have

Power v Manhart, 435 US 702, 707 & n 13; 98 S Ct 1370; 55 L Ed 2d 657 (1978) (citation omitted).]

Various federal courts have since followed *Price Waterhouse* in recognizing that sex discrimination occurs when an employee suffers an adverse employment action because they defy the socially constructed gender norms. See, e.g., *R G & G R Harris Funeral Homes*, 884 F3d at 576; *Zarda*, 883 F3d at 120-121; *Hively*, 853 F3d at 347.

In considering this line of federal caselaw as applied to Michigan's ELCRA, we agree that discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sexual stereotypes, and we believe that this theory could serve as an alternate basis for holding that sex discrimination occurred in this case.

[14] In dissent, Justice VIVIANO argues that there are actually three factors at hand in this but-for analysis. In addition to sex and sex preference, he argues that sexual orientation is a third relevant fact. According to this approach, our but-for analysis changes both sex and sexual orientation rather than one single factor. This approach ignores that sexual orientation in this context is simply a helpful shorthand for the combination of sex and sex preference; it is not an independent factor. The but-for test cannot, and should not, be evaded through reference to a third, dependent variable that necessarily changes when the protected characteristic also changes.

questioned in members of a different sex."). In sum, a person's sexual orientation necessarily implies conclusions about their sex, and so "it is impossible to discriminate against a person" for their sexual orientation "without discriminating against that individual based on sex." *Id*. at ___; 140 S Ct at 1741.[15]

Plaintiff Rouch World disputes this conclusion, arguing that sex discrimination is not a necessary consequence of discrimination based on sexual orientation. It posits that a person or corporation could enact a blanket policy refusing services to persons of a particular sexual orientation without considering sex at all. Said policy would apply to all persons of that sexual orientation, regardless of whether they are male or female. But this assertion ignores the interdependent relationship between sexual orientation and sex. As the United States Supreme Court explained:

> [Even if] an employer asked homosexual or transgender applicants to tick a box on its application form, . . . the individual applicant's sex [would] still weigh[] as a factor in the employer's decision. . . .
>
> . . . There is no way for an applicant to decide whether to check the homosexual or transgender box without con-

[15] We note that our conclusion would not change were the sexual orientation at issue bisexual rather than homosexual. A discriminator cannot escape liability for sex discrimination on the basis that the individual discriminated against has a sexual orientation that the discriminator *does* find acceptable in addition to the sexual orientation that the discriminator *does not* find acceptable. For example, had the complainant in the present case been bisexual rather than homosexual, plaintiff Rouch World's denial of services would still constitute sex discrimination because it would be based in a trait—sexual attraction to women—that would have been accepted had the hypothetical complainant been a bisexual or heterosexual man. That one form of expression of the hypothetical complainant's sexual orientation would have been acceptable to the discriminator in each scenario is of no legal consequence.

> sidering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words, man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. . . . Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individual's sex . . . . [*Id.* at ___; 140 S Ct at 1746.]

See also *Hively v Ivy Tech Community College of Indiana*, 853 F3d 339, 350 (CA 7, 2017) ("It would require considerable calisthenics to remove 'sex' from 'sexual orientation.' "). Because one's sex is necessary to the identification of sexual orientation, discrimination on that basis is discrimination on the basis of sex. Incorporating an additional consideration—such as the sex preference of that individual—and retitling that pair of considerations does not remove the effect of sex from the equation. See *Bostock*, 590 US at ___; 140 S Ct at 1741 ("It doesn't matter if other factors besides the plaintiff's sex contributed to the decision."). In other words, the determination of sexual orientation involves both the sex of the individual and the sex of their preferred partner; referring to these considerations jointly as "sexual orientation" does not remove sex from the calculation.[16] Were this Court to follow the approach proposed by Rouch World and adopted by

[16] Justice ZAHRA's assertion that "sex" and "sexual orientation" are not equivalent terms is correct, but irrelevant to the analysis. The narrow reading of "sex" that his dissent offers fails to recognize that when Rouch World discriminates against a person "because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex." *Hively*, 853 F3d at

Justice ZAHRA in dissent, any individual "would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology." *Zarda v Altitude Express, Inc*, 883 F3d 100, 114 (CA 2, 2018).[17]

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359 (Flaum, J., concurring). "Sexual orientation" does not have to be synonymous with "sex" for the discrimination to be, inherently, sex-based.

[17] Justice VIVIANO agrees that a blanket policy of sexual-orientation discrimination would not run afoul of the ELCRA's prohibition of sex discrimination. He reasons, in part, that the but-for causation standard, as it has been applied in the context of the ELCRA, contains some requirement of a showing of motivation or intent to discriminate on the basis of the protected characteristic at hand. And because the discriminator in this scenario intends to discriminate regarding the individual's sexual orientation and not their sex, the but-for causation standard is not met.

We do not, and need not, take a position on Justice VIVIANO's assertion that the but-for causation standard requires some proof of intent to discriminate. The only issue before this Court is whether discrimination on the basis of sexual orientation is included within the ELCRA's prohibition of discrimination because of sex. This is the first step in any discrimination analysis under the ELCRA. See, e.g., *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007) (holding that "[i]n order to state a claim under MCL 37.2302(a), [a] plaintiff must establish four elements: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation"); *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001) (holding that in the employment context, to establish a prima facie case of discrimination a complainant must "present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination"). Our opinion should not be read as altering precedent governing subsequent steps in a discrimination analysis, such as what evidence is necessary to prove causation in an enforcement action brought under the ELCRA, and it is unclear why the dissent believes we have done so.

Even if such an intent requirement existed, it would likely be met here given the facts that plaintiffs alleged in their complaint. As discussed earlier, sex is an intrinsic component of sexual orientation. Accordingly, an individual's intent to discriminate on the basis of sexual

Further, plaintiff Rouch World's approach would also apply a group-based analysis to the ELCRA that is not supported by its text. Recall that MCL 37.2302(a) prohibits a person or corporation from "[d]eny[ing] *an individual* the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of certain places and services. (Emphasis added.) By using the term "individual" rather than "group," the ELCRA penalizes discriminatory action as applied to individuals, eschewing an analysis that looks instead to the differential treatment of groups. See *Bostock*, 590 US at ___; 140 S Ct at 1740-1741. The ELCRA's prohibition of sex discrimination requires a determination whether a specific individual was treated worse than a member of the opposite sex would have been; it does not ask how one sex-based group is treated as compared to another sex-based group. It is, therefore, no defense for a discriminator "to say it discriminates against both men and women because of sex"—instead, this practice doubles rather than dissolves liability because the ELCRA's focus is on individuals rather than groups. *Id*. at ___; 140 S Ct at 1741 ("This statute works to protect individuals of both sexes from discrimination, and does so equally.").[18]

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orientation is sufficient to fulfill any requirement that the individual intended to discriminate on the basis of sex. In the present case, Rouch World asserts that it denied services to the complainants on the basis of their homosexuality. Because sexual orientation is intrinsically linked to sex, this action constitutes sex discrimination. Further, the discriminatory intent evidenced by Rouch World is sufficient to satisfy any motivational requirement possibly encompassed by the but-for causation standard.

[18] Our courts have rejected a similar argument made in the context of applying the ELCRA's prohibition of race discrimination to interracial associations. Specifically, the Court of Appeals rejected an employer's argument that its blanket policy prohibiting interracial marriage did not violate the ELCRA because it discriminated equally against employ-

Were a business to discriminate against both a homosexual male and a homosexual female, the business would be subject to liability under the ELCRA for both because in both cases the business discriminated against the individual for traits it otherwise would have tolerated in a different sex. See *id*.

Plaintiff Rouch World, along with the dissent, also criticizes this conclusion as inconsistent with the intent of the 1976 Legislature that enacted the ELCRA. It argues that the ELCRA's legislative history demonstrates that the Legislature intentionally chose to exclude protections from discrimination based on sexual orientation, both at the time of its enactment by declining to include the specific language and repeatedly thereafter by rejecting proposed amendments that would have added the specific language. However, the legislative history of a statute is relevant to the statute's meaning only where the statute is ambiguous. See *Luttrell v Dep't of Corrections*, 421 Mich 93, 103; 365 NW2d 74 (1984). When the statute's language is clear, as it is here, we rely on that plain language as the best evidence of its meaning. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).[19] Further, Rouch World's assertion that the

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ees of all races. See *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424, 430; 390 NW2d 732 (1986) ("If an employer discriminates against a white (or black) employee because of the latter's marriage to a black (or white) spouse, the race of both the employee and the spouse is a motivating factor. Thus, it must be concluded that the employee in such a case is discriminated against 'because of race' . . . ."). See also *Graham v Ford*, 237 Mich App 670, 677-678; 604 NW2d 713 (1999) (applying *Bryant*).

[19] Even if the rules of construction encouraged consideration of legislative history under the present circumstances, there are often practical difficulties with discerning legislative intent from legislative history, and those difficulties abound here. Examination of legislative history is necessarily difficult, as "dozens if not hundreds of legislators

1976 Legislature that enacted ELCRA would not have

have their own subjective views on the minutiae of bills they are voting on—or perhaps no views at all because they are wholly unaware of the minutiae." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 392. Discerning a single intent from these hundreds of subjective views is difficult, and Rouch World's and amici's offering of news articles reflecting the opinions of single legislators does little to ease that difficulty. Even sources like bill analyses, committee reports, and floor debate, which may reflect the views of some group of legislators, are of dubious value. See *id*. at 376 (noting that floor statements can be delivered to small or no amount of other legislators and that committee reports are drafted by committee staff and not legislators); *In re Certified Question from the US Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) (specifically critiquing legislative analyses on the grounds that "(1) such analyses are not an official form of legislative record in Michigan, (2) such analyses do not purport to represent the views of legislators, individually or collectively, but merely to set forth the views of professional staff offices situated within the legislative branch, and (3) such analyses are produced outside the boundaries of the legislative process as defined in the Michigan Constitution").

As noted earlier, there are any number of potential explanations why sexual orientation was not explicitly included in the ELCRA in 1976. Perhaps some legislators believed that sexual-orientation discrimination was necessarily included through the prohibition on sex discrimination and so did not seek its explicit inclusion. Perhaps other legislators believed the opposite. Or perhaps, as plaintiff and some amici also argue, the Legislature did not anticipate that the ELCRA could or would be applied in this manner. See *Bostock*, 590 US at ___; 140 S Ct at 1750-1751. The legislative history is more unclear than Rouch World represents.

As for subsequent legislatures that considered but did not adopt proposed amendments that would add sexual orientation explicitly, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v Price*, 361 US 304, 313; 80 S Ct 326; 4 L Ed 2d 334 (1960). The rejection of subsequent proposed amendments runs into the same difficulties expressed earlier with regard to the statute's initial enactment: there are any number of reasons supporting the rejection of amendments, and the legislative history generally fails to provide a cogent, entity-wide reasoning for that action. See *Bostock*, 590 US at ___; 140 S Ct at 1747. Further, the amendments proposed do not appear to have been brought before the entirety of the Legislature, and so it is especially dubious that their

foreseen the application of its prohibition on discrimination "because of . . . sex" to sexual orientation does not render the statute ambiguous. As recognized by the United States Supreme Court, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v Sundowner Offshore Servs, Inc*, 523 US 75, 79; 118 S Ct 998; 140 L Ed 2d 201 (1998). So while the principal evil motivating the 1976 Legislature to prohibit discrimination on the basis of sex may have been the preferential treatment of males to the detriment of females, this motivation does not curtail other applications of the plain statutory language. See *Bostock*, 590 US at ___; 140 S Ct at 1747 ("Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."). Notably, both the ELCRA and Title VII have been applied to circumstances likely unanticipated by the enacting Legislature, including pregnancy discrimination, sex-stereotyping cases, same-sex sexual harassment, and retirement accounts. See, e.g., *Robinson v Ford Motor Co*, 277 Mich App 146, 153; 744 NW2d 363 (2007) (allowing liability under the ELCRA for same-sex hostile-work-environment claims); *Price Waterhouse v Hopkins*, 490 US 228, 256; 109 S Ct 1775; 104 L Ed 2d 268 (1989) (opinion of Brennan, J.; superseded by statute on other grounds) (allowing

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rejection represents rejection by the Legislature as a whole. See *In re Certified Question*, 468 Mich at 115 n 5.

Again, given the lack of ambiguity in the statute's language, this Court need not and should not attempt to decipher the statute's meaning from this varied and enigmatic legislative history. See *id*. ("Legislative history cannot be used to create an ambiguity where one does not otherwise exist.").

liability under Title VII because the employer's actions "were motivated by stereotypical notions about women's proper deportment"); *Los Angeles Dep't of Water & Power v Manhart*, 435 US 702; 98 S Ct 1370; 55 L Ed 2d 657 (1978) (allowing liability under Title VII for requiring women to make larger pension fund contributions because of their statistically greater longevity). Again, the Legislature's failure to foresee particular statutory applications does not prohibit these applications so long as they are consistent with the plain language of the statute.[20]

Should the Legislature disapprove of an application of a statute's enacted language, the Legislature remains free to amend the statute. This Court, however, is bound by the language that the Legislature has

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[20] In dissent, Justice ZAHRA argues that this concept does not apply here because this opinion "reads into the ELCRA something that the Legislature expressly considered but rejected . . . ." *Post* at 453 n 51. In support of this assertion, Justice ZAHRA notes that the Civil Rights Committee held a roll-call vote on whether to include sexual orientation in the ELCRA and that the Committee declined to do so by a 5 to 3 vote. He further notes that, on the day the bill was scheduled to be voted out of committee, the committee room was filled with advocates protesting the bill's failure to include an explicit prohibition of sexual-orientation discrimination. But these observations do not demonstrate the intent of the Legislature as a whole. At best, they establish that eight legislators were aware of the bill's failure to include sexual-orientation discrimination specifically and that a majority of those legislators approved of this lack of inclusion. This does not necessarily establish that this majority intended and understood that the ELCRA would not protect against sexual-orientation discrimination—as described earlier, some legislators may have believed it was already included through the prohibition on sex discrimination. And even if the legislative history *did* establish that, it cannot do the same for the remainder of the more than one hundred other legislators that ultimately voted on the ELCRA. See *Reading Law*, p 392. Unlike other cases wherein we have found legislative history to be relevant to the Legislature's intent, the legislative history here does not include changes or alternatives contemplated by the entirety or even the majority of the Legislature. See, e.g., *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999).

enacted, not what the parties or amici believe the Legislature should have enacted or what any individual representative believed was enacted. See *Oncale*, 523 US at 79.

IV. CONCLUSION

Discrimination on the basis of sexual orientation necessarily constitutes discrimination because of sex. Accordingly, the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" on the basis of sexual orientation constitutes discrimination "because of . . . sex" and, therefore, constitutes a violation of the ELCRA under MCL 37.2302(a). We reverse the Court of Claims' decision to the contrary and remand this case for further proceedings consistent with this opinion.

MCCORMACK, C.J., and BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with CLEMENT, J.

ZAHRA, J. (*dissenting*). The Court's majority opinion is a victory for a good many Michiganders who worked diligently and unyieldingly for sexual-orientation equality under the law since the enactment of the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*., more than 45 years ago.[1] I take no issue with the merits of the policy adopted today by a majority of this Court. I also harbor no doubt that my

[1] The ELCRA was drafted, introduced, voted out of both houses of our Legislature, and signed by the Governor in Michigan's 78th legislative session (1975–1976). The ELCRA became effective in 1977, at the expiration of 90 days after the Legislature adjourned *sine die*. See Const 1963, art 4, § 27.

colleagues in the majority are acting in good faith, with pure hearts and the best of intentions.

Yet under the Michigan Constitution, the Legislature—or the people through the exercise of direct democracy—bears the ultimate responsibility to write, amend, or repeal the laws of this state.[2] And this Court's duty is to say what the law is, not what it thinks the law ought to be.[3] But this is exactly what a majority of this Court has done here. The majority opinion declares that the ELCRA's prohibition of discrimination "because of . . . sex" precludes discrimination because of sexual orientation—an interpretation that eluded the Legislature, the courts, the Michigan Civil Rights Commission (the MCRC), the Michigan Department of Civil Rights (the MDCR), and the people of Michigan for the vast majority of the ELCRA's 45-year existence.[4]

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[2] See Const 1963, art 4, § 1 (vesting the legislative power in the Michigan Legislature); Const 1963, art 4, § 33 (setting forth the process by which "[e]very bill passed by the legislature . . . becomes law"); Const 1963, art 2, § 9 (recognizing the power of the people "to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum").

[3] As aptly stated by Justice Kavanaugh in his dissenting opinion in *Bostock v Clayton Co*, 590 US ___, ___; 140 S Ct 1731, 1836; 207 L Ed 2d 218 (2020), "when this Court usurps the role of [the Legislature], as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference."

[4] How this case wound up before us should not be lost on anyone. The MCRC is charged with investigating alleged discrimination prohibited under Michigan law. Const 1963, art 5, § 29. The MCRC does this via the MDCR. See MCL 16.575; MCL 16.577. For more than 40 years, from the enactment of the ELCRA in 1976 until 2018, the MCRC repeatedly and explicitly took the position that sexual-orientation discrimination was *not* prohibited under Michigan law. This understanding was consistent with Michigan caselaw addressing the question. See, e.g., *Barbour v*

I would affirm the Court of Claims' conclusion that sexual orientation is not a protected class under the ELCRA. The majority opinion declares that "because of . . . sex" means something that nobody in 1976 thought it meant. In so doing, the majority opinion also declares that phrase to encompass something that the enacting Legislature specifically and explicitly considered including but ultimately chose not to embrace. Whatever one's personal views about what the ELCRA ought to prohibit, its language prohibiting discrimination "because of . . . sex" does not prohibit sexual-orientation discrimination, and it is not within the constitutional power of this Court to alter that language. If we are to be faithful to our constitutional mandate to say what the law is, we simply cannot pretend that the ELCRA says something that it does not say. Because the majority opinion is inconsistent with these bedrock principles of Michigan's constitutional system, I must dissent.

I. APPLICABLE STANDARD OF REVIEW AND CORRESPONDING RULES OF STATUTORY INTERPRETATION

We review questions of statutory interpretation de novo.[5] " 'The cardinal rule of statutory construction is

Dep't of Social Servs, 198 Mich App 183; 497 NW2d 216 (1993). For years, the MCRC tried unsuccessfully to get the Legislature to amend the ELCRA to include sexual orientation as a protected class. These efforts apparently exhausted the MCRC, and, in 2018, it elected to end-run the Legislature by declaring in Interpretive Statement 2018-1 that the ELCRA has always prohibited sexual-orientation discrimination (as well as gender-identity discrimination). The MCRC directed the MDCR to enforce the ELCRA accordingly. In this way, the MCRC invaded both the law-making power exclusively assigned to the Legislature and the judicial power to interpret law exclusively assigned to Michigan's courts.

[5] *American Civil Liberties Union of Mich v Calhoun Co Sheriff's Office*, 509 Mich 1, 8; 983 NW2d 300 (2022) (*ACLU of Mich*); *Dep't*

to discern and give effect to the intent of the Legislature.' "[6] We begin our interpretive inquiry with the words of a statute because they provide the best evidence of the Legislature's intent and its policy choices.[7] And those words "should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute."[8] When statutory language is unambiguous, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed by the words it chose.[9]

Moreover, statutory interpretation involves the search for a statute's original public meaning, which is

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of Talent & Economic Dev / Unemployment Ins Agency v Great Oaks Country Club, Inc, 507 Mich 212, 226; 968 NW2d 336 (2021).

[6] *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011), quoting *Drouillard v Stroh Brewery Co*, 449 Mich 293, 302; 536 NW2d 530 (1995). See also *City of Lansing v Lansing Twp*, 356 Mich 641, 648; 97 NW2d 804 (1959).

[7] *People v Harris*, 499 Mich 332, 345; 885 NW2d 832 (2016), citing *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). See also *ACLU of Mich*, 509 Mich at 8 ("The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language.") (quotation marks and citation omitted); *Dep't of Talent & Economic Development / Unemployment Ins Agency*, 507 Mich at 226 (same principle); *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007) ("When interpreting a statute, our primary obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language.") (citations omitted).

[8] *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012), citing *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[9] *ACLU of Mich*, 509 Mich at 8, citing *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1, 9; 967 NW2d 577 (2021) ("When the statutory language is clear and unambiguous, judicial construction is not permitted and the statute is enforced as written.") (quotation marks and citation omitted).

the meaning that the relevant linguistic community (i.e., legislators, courts, agencies, and reasonably informed members of the public) understood it to possess at the time it was enacted into law. "[S]tatutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts."[10] Thus, the core of the interpretive enterprise is discovering what the linguistic community's chosen words meant to that community at the time those words became law.[11]

II. ANALYSIS

This Court is constitutionally entrusted with the privilege of interpreting the duly enacted laws of Michigan. But the majority opinion's holding that the ELCRA has *always* prohibited sexual-orientation discrimination amounts to an exercise of legislative, not

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[10] Manning, *The Absurdity Doctrine*, 116 Harv L Rev 2387, 2457 (2003); see also *id*. at 2392-2393 (explaining that proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language").

[11] See Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 Geo J L & Pub Pol'y 49, 63 (2020), quoting Cooley, *Constitutional Limitations* (1st ed), p 38 n 1 (" 'Interpretation is the act of finding out the true sense of any form of words, that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey . . . .' ") (quotation marks and citation omitted). See also Manning, *What Divides Textualists from Purposivists?*, 106 Colum L Rev 70, 79-80 (2006) ("Because one can make sense of others' communications only by placing them in their appropriate social and linguistic context, textualists further acknowledge that '[i]n textual interpretation, context is everything.' ") (citation omitted).

judicial, power. The relevant evidence, all of which establishes the historical-linguistic context necessary for an accurate interpretation of the ELCRA, demonstrates that the best reading of the ELCRA is that it prohibits *sex* discrimination, i.e., differential, negative treatment of persons of one gender vis-à-vis persons of the other gender, not *sexual-orientation* discrimination.

A. THIS COURT IS NOT CONSTITUTIONALLY AUTHORIZED TO MAKE POLICY, AND FOR IT TO DO SO SERIOUSLY UNDERMINES MICHIGAN'S CONSTITUTIONAL ORDER

In 1963, the people of the state of Michigan, in whom "[a]ll political power is inherent,"[12] adopted our state's Constitution, which separates the legislative, executive, and judicial powers into three distinct branches: the Legislature, the Governor, and the courts.[13] In so doing, the people of Michigan delegated to the Legislature " 'the legislative power of the State of Michigan[.]' "[14] Put another way, Michigan's Constitution vests in the Legislature "the power to make laws,"[15] or "the rules by which the duties and rights of every citizen are to be regulated."[16] Michigan's Constitution

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[12] Const 1963, art 1, § 1.

[13] Const 1963, art 3, § 2.

[14] *Coalition of State Employee Unions v Michigan*, 498 Mich 312, 332; 870 NW2d 275 (2015), citing Const 1963, art 4, § 1; see also *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 65; 718 NW2d 784 (2006) ("It is the legislators who establish the statutory law because the legislative power is exclusively theirs."), overruled on other grounds by *Regents of Univ of Mich v Titan Ins Co*, 487 Mich 289 (2010); *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98 n 18, 117; 754 NW2d 259 (2008).

[15] *In re Complaint of Rovas*, 482 Mich at 98.

[16] The Federalist No. 78 (Hamilton) (Rossiter ed, 1961), p 465.

also vests in the judicial branch of government the power to interpret and apply the law.[17]

The separation of powers is an indispensable part of our constitutional system, and its cultivation and preservation provides the context within which the exercise of liberty is made possible. "By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise. '[T]here [is] no liberty . . . if the power of judging be not separated from the legislative and executive powers.' "[18]

The federal system also features the separation of powers, and by looking to that system, we can better comprehend the function and purpose of the separation of powers in Michigan.[19] The Supreme Court of the United States has explained that the separation of powers is intended to preserve the constitutional system of "checks and balances . . . built into the tripartite Federal Government as a self-executing safeguard

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[17] See *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959) (" 'The primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto.' "), quoting 16 CJS, Constitutional Law, § 144, p 687. See also *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

[18] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004), quoting The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 299 (alterations in *Nat'l Wildlife Federation*), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010).

[19] See *Nat'l Wildlife Federation*, 471 Mich at 613 n 5, quoting *Schwartz v Flint*, 426 Mich 295, 306; 395 NW2d 678 (1986) ("The separation of powers provision in [the Michigan Constitution] is 'in harmony with American political theory, the State government [being] divided into the three historic departments, the legislative, executive, and judicial . . . .' ").

against the encroachment or aggrandizement of one branch at the expense of the other."[20] The "first purpose" of the separation of powers is "to prevent an unnecessary and therefore dangerous concentration of power in one branch."[21] The separation of powers is also "intended, in part, to protect each branch of government from incursion by the others."[22]

Pursuant to this constitutional structure, policymaking is fundamentally a legislative prerogative.[23] As between the Legislature and this Court, we have recognized that the Legislature is the superior institution for creating the public policy of this state:

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[20] *Buckley v Valeo*, 424 US 1, 122; 96 S Ct 612; 46 L Ed 2d 659 (1976), relying on The Federalist No. 51 (Madison) (Putnam's Sons ed, 1908), pp 323-324. See also *Consumer Energy Council of America v Fed Energy Regulatory Comm*, 218 US App DC 34, 80; 673 F2d 425 (1982) ("The fundamental purpose of [the separation of powers] is to check the extent of power exercisable by any one branch of Government in order to protect the people from oppression."), relying on *Buckley*, 424 US at 122, aff'd sub nom *Process Gas Consumers Group v Consumer Energy Council of Am*, 463 US 1216 (1983). Accord The Federalist No. 47 (Madison) (Rossiter ed, 1961), p 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.").

[21] *Chadha v Immigration & Naturalization Serv*, 634 F2d 408, 422 (CA 9, 1980), aff'd 462 US 919 (1983).

[22] *Bond v United States*, 564 US 211, 222; 131 S Ct 2355; 180 L Ed 2d 269 (2011). The separation of powers does more than just restrain the branches. See *Gundy v United States*, 588 US ___, ___; 139 S Ct 2116, 2135; 204 L Ed 2d 522 (2019) (Gorsuch, J., dissenting) (explaining that "enforcing the separation of powers" is also about "safeguarding a structure designed to protect [the people's] liberties, minority rights, fair notice, and the rule of law").

[23] *Blank v Dep't of Corrections*, 462 Mich 103, 116; 611 NW2d 530 (2000); *American States Ins Co v Detroit Auto Inter-Ins Exch*, 117 Mich App 361, 367; 323 NW2d 705 (1982).

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.[24]

Accordingly, courts are "not to second-guess [the Legislature's] policy decisions or to change the words of a statute in order to reach a different result."[25] And just because legislation "appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the [L]egislature and substitute its own solution."[26] "We do not sit as the 'legislators in chief' of this state," standing at the ready to update the Legislature's work product that we find " 'cumbersome,' 'impractical,' or 'inadequately precise.' "[27]

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[24] *Woodman v Kera LLC*, 486 Mich 228, 245-246; 785 NW2d 1 (2010) (quotation marks and citations omitted). Accord *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002), citing *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

[25] *Harris*, 499 Mich at 345. See also *Pontiac Sch Dist v Pontiac*, 262 Mich 338, 353; 247 NW 474 (1933) ("The constitutional duty of courts is to interpret and apply the law, not to enact laws."), abrogated on other grounds by *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42 (2018).

[26] *Doe v Dep't of Social Servs*, 439 Mich 650, 681; 487 NW2d 166 (1992) (quotation marks and citation omitted). See also *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) (holding that "our judicial role 'precludes imposing different policy choices than those selected by the Legislature' " and, therefore, "the judicial branch cannot amend [a statute] to make it 'better' " because "[t]hat is an authority reserved solely to the Legislature") (quotation marks and citation omitted), quoting *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002).

[27] See *People v Dunbar*, 499 Mich 60, 71-72; 879 NW2d 229 (2016), citing *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 163-164; 680

All this to say, this Court's duty is "to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere."[28] In our system of government, this Court's function is "to fairly interpret a statute as it then exists; it is not the function of the court to legislate."[29] Thus, "[i]n accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power."[30] The foregoing principles, when taken together and adhered to, prevent "the judiciary from usurping the powers of the political branches,"[31] which also serves to uphold the people's chosen constitutional structure, under which the power and duty to write laws belongs to the Legislature, not this Court.

NW2d 840 (2004), superseded by statute as stated in *South Dearborn Environmental Improvement Ass'n v Dep't of Environmental Quality*, 502 Mich 349, 363-365; 917 NW2d 603 (2018).

[28] *City of Lansing*, 356 Mich at 648 (quotation marks and citation omitted). Accord *People v Detroit, GH & M R Co*, 228 Mich 596, 612; 200 NW 536 (1924) ("[C]ourts cannot make laws; they can but interpret them in conformity with the legislative intent."). See also *Dunbar*, 499 Mich at 71-72 (explaining that the authority to rewrite statutes rests with the Legislature, not this Court).

[29] *Roosevelt Oil Co v Secretary of State*, 339 Mich 679, 694; 64 NW2d 582 (1954).

[30] *In re Complaint of Rovas*, 482 Mich at 98 (quotation marks and citation omitted; brackets in original). Accord *People v Steanhouse*, 500 Mich 453, 489; 902 NW2d 327 (2017) (MARKMAN, C.J., concurring in part and dissenting in part).

[31] *Mich Chiropractic Council v Comm'r of Office of Fin and Ins Servs*, 475 Mich 363, 374; 716 NW2d 561 (2006) (opinion of YOUNG, J.); *id*. at 387 (MARKMAN, J., concurring in part), overruled on other grounds by *Lansing Sch Ed Ass'n*, 487 Mich 349.

B. THE ELCRA, AS WRITTEN, DOES NOT PROHIBIT SEXUAL-ORIENTATION DISCRIMINATION

I would affirm the Court of Claims' conclusion that sexual orientation is not a protected class under the ELCRA and, consequently, would also affirm the result in *Barbour*.[32] The majority opinion fails to read "because of . . . sex" in its proper context, as those words were understood in 1976, when the Legislature passed the ELCRA. Because the word "sex" is not expressly defined in the ELCRA, the Court may consult dictionary definitions to determine its meaning.[33] The relevant meaning is to be found in dictionaries that existed prior to the ELCRA's enactment (or slightly after, given that " '[d]ictionaries tend to lag behind linguistic realities' "[34]).

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[32] *Barbour*, 198 Mich App at 185 (holding that "harassment or discrimination based upon a person's sexual orientation is not an activity proscribed by the [ELCRA]"). As the majority opinion notes, *Barbour* adopted, without independent analysis, the conclusion of various federal circuit courts, which held decades ago that Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*., does not prohibit sexual-orientation discrimination. Those cases were overruled by *Bostock*. But I can, and would, affirm *Barbour*'s result because my opinion does not rely on and is not controlled by the reasoning of *Bostock*.

[33] *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997) (stating that "when terms are not expressly defined by a statute, a court may consult dictionary definitions"). To avail ourselves of dictionaries is consistent with the Legislature's command in MCL 8.3a that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

[34] *People v Wood*, 506 Mich 114, 123 n 7; 954 NW2d 494 (2020), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 419.

The *American Heritage Dictionary* (1970) provides the following definitions for "sex":

> 1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions, designated *male* and *female*, of this classification. 2. Males or females collectively. 3. The sexual urge or instinct as it manifests itself in behavior. 4. Sexual intercourse.[35]

Similarly, *Webster's New Collegiate Dictionary* (1976) defines "sex" as follows:

> 1 : either of two divisions of organisms distinguished respectively as male or female[;] 2 : the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females[;] 3 a : sexually motivated phenomena or behavior[;] b: sexual INTERCOURSE[;] 4 : genitalia[.][36]

Examples abound.[37]

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[35] *American Heritage Dictionary* (1970) (boldface omitted).

[36] *Webster's New Collegiate Dictionary* (1976) (boldface omitted).

[37] Every dictionary published before 1977 that I examined lists biological sex—the distinction between male and female—as its focal definition of "sex." See, e.g., *Webster's Third New International Dictionary* (1966) ("**1**: one of the two divisions of organic esp. human beings respectively designated male or female[;] **2**: the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable[;] **3**: the sphere of interper-

sonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union[;] **4**: the phenomenon of sexual instincts and their manifestations") (usage examples omitted); *Webster's Seventh New Collegiate Dictionary* (1969) ("**1**: either of two divisions of organisms distinguished respectively as male or female[;] **2**: the sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two interacting parents and distinguish males and females[;] **3 a**: sexually motivated phenomena or behavior[;] **b**: sexual INTERCOURSE"); *The Random House Dictionary* (1971) (**1.** the fact or character of being either male or female. **2.** either of the two groups of persons exhibiting this character. **3.** the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **4.** the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **5.** coitus. **6.** to have sex, *informal*, to engage in sexual intercourse. **7.** to ascertain the sex of, esp. of newly-hatched chicks. **8.** sex it up, slang. to neck passionately. **9.** sex up, *informal*. **a.** to arouse sexually. **b.** to increase the appeal of; to make more interesting, attractive, or exciting.") (usage examples omitted); *Webster's New World Dictionary of the English Language* (2d college ed, 1974) ("**1.** either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions[;] **2.** the character of being male or female; all the attributes by which males and females are distinguished[;] **3.** anything connected with sexual gratification or reproduction or the urge for these; esp., the attraction of those of one sex for those of the other[;] **4.** sexual intercourse").

The same is true of a dictionary published slightly after the ELCRA's enactment into law, which is appropriate to consult given that " '[d]ictionaries tend to lag behind linguistic realities,' " *Wood*, 506 Mich at 123 n 7, quoting *Reading Law*, p 419. See *Webster's New Twentieth Century Dictionary* (1983) (defining "sex" as "1. either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively. 2. the character of being male or female; all of the things which distinguish a male from a female. 3. anything connected with sexual gratification or reproduction or the urge for these, especially the attraction of individuals of one sex for those of the other. 4. the female sex; women: with the article *the*. *sex appeal*, sex attraction, or the quality or qualities of an individual that are attractive to a member of the opposite sex. *the fair* (or *gentle*, *weaker*) *sex*; women. *the sterner* (or *stronger*) *sex*; men"). See also *American Heritage Dictionary* (1979) (entry for "sex" identical to *American Heritage Dictionary* (1970)).

The litigants debate the breadth of the definition of "sex." As noted in the majority opinion, "[p]laintiff Rouch World and certain amici propose a narrower definition of 'sex' that defines the word as 'whether one is a biological male or biological female'; but defendants and other amici propose a more expansive definition that incorporates physiological, structural, and behavioral characteristics."[38] The majority opinion "use[s] but do[es] not affirmatively rule in favor of the more restrictive definition,"[39] concluding that defendants prevail even under this narrower definition.

Contrary to the position expressed by defendants and adopted arguendo by the majority opinion, I conclude that the ELCRA's use of "sex" refers to whether one is a biological male or a biological female, as illustrated by the definitions set forth earlier. But, contrary to the majority opinion, I conclude that defendants do not prevail under that narrower definition. This is so because no person familiar with the common usage of the English language in 1976 would have

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Finally, the definition of "sex" in *Webster's Third* (1966) is particularly notable because the publication of that dictionary accompanied "a new era" for dictionaries as a whole: "one in which describing how people use language became more important than showing them how to do so properly." King, *The Draconian Dictionary Is Back*, The Atlantic (August 5, 2018) <https://www.theatlantic.com/technology/archive/2018/08/the-draconian-dictionary-is-back/566660/> (accessed July 23, 2022) [https://perma.cc/LBT8-JQKM]. That is, *Webster's Third* is a "descriptivist" dictionary, and "[d]escriptivist lexicographers, steeped in linguistic theory, eschew value judgements about so-called correct English and instead describe how people are using the language." *Id*. That the focal definition of "sex" in *Webster's Third* is the male-female distinction is therefore good evidence that biological sex is what was meant by the ELCRA's drafters when they included sex as a protected class.

[38] *Ante* at 421.

[39] *Ante* at 421.

understood the ordinary meaning of "sex" to include "sexual orientation." Simply stated, if discrimination "because of . . . sex" retains its original, plain, and single meaning of treating similarly situated biological women differently and worse than similarly situated biological men, and vice versa,[40] then defendants' ar-

[40] This Court has held that, under the ELCRA, "the essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex." *Radtke v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993). See also *Diamond v Witherspoon*, 265 Mich App 673, 683; 696 NW2d 770 (2005) (same). The Supreme Court of the United States has joined us in the context of Title VII, on which the ELCRA was "clearly modeled." *Rasheed v Chrysler Corp*, 445 Mich 109, 123 n 20; 517 NW2d 19 (1994). In *Oncale v Sundowner Offshore Servs, Inc*, 523 US 75; 118 S Ct 998; 140 L Ed 2d 201 (1998), the Court unanimously adopted Justice Ginsburg's understanding of sex discrimination, stating that it occurs for purposes of Title VII when " 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' " *Id*. at 80, quoting *Harris v Forklift Sys, Inc*, 510 US 17, 25; 114 S Ct 367; 126 L Ed 2d 295 (1993) (Ginsburg, J., concurring). In other words, the ELCRA's prohibition of discrimination "because of . . . sex" prohibits "double standards for men and women—policies that disfavor at least some individuals of one sex compared with similarly situated members of the other." Anderson, *On the Basis of Identity: Redefining "Sex" in Civil Rights Law and Faulty Accounts of "Discrimination*," 43 Harv J L & Pub Pol'y 387, 390 (2020).

A clear example that showcases what sex discrimination is comes from a case argued by then-advocate Ginsburg herself: *Weinberger v Wiesenfeld*, 420 US 636; 95 S Ct 1225; 43 L Ed 2d 514 (1975). In *Weinberger*, the Supreme Court of the United States held that a sex-based distinction in the disbursement of Social Security survivor's benefits violated the Fifth Amendment's Due Process Clause. *Id*. at 654. Prior to *Weinberger*, a widow (and her children) could receive Social Security survivor's benefits, but only a widower's *children* could receive them, *not the widower himself*. *Id*. The Court held that the sex discrimination consisted in the fact that male surviving spouses were treated differently and worse than their female counterparts, on account of, or by reason of, or because of, their sex; had they been women (widows), they would have received the surviving-spouse benefits, but because they were men (widowers), they were ineligible for those benefits. That is, male surviving spouses were subjected to a "double

gument that the ELCRA prohibits sexual-orientation discrimination on the basis of its prohibition of discrimination "because of . . . sex" fails.[41]

Defendants claim, and the majority opinion holds, that plaintiff's refusal to participate in the celebration of complainants' homosexual marriage amounts to unlawful discrimination "because of . . . sex" under the ELCRA, on the ground that plaintiff's refusal necessarily implicates sex. The heart of defendants' argument is that " '[b]ecause one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex.' "[42] But this logic embodies a false premise. Sex can, and does, exist and can be determined without reference to

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standard[]" that "disfavor[ed] at least some individuals of one sex compared with similarly situated members of the other." *On the Basis of Identity*, 43 Harv J L & Pub Pol'y at 390. Said another way, male surviving spouses were " 'exposed to disadvantageous terms or conditions' " to which female surviving spouses were " 'not exposed.' " *Oncale*, 523 US at 80, quoting *Harris*, 510 US at 25 (Ginsburg, J., concurring). Said still another way, and borrowing this Court's own words, "similarly situated people [were] treated differently because of their sex." *Radtke*, 442 Mich at 379; see also *Diamond*, 265 Mich App at 683.

[41] While not directly applicable, this Court has previously stated that the ELCRA does not prohibit sexual-orientation discrimination:

> [N]one of the exceptions where a suit is allowed against the government can be read to allow suit for sexual orientation discrimination. Likewise, no statute grants governmental agencies the authority to create an immunity exception for sexual orientation discrimination or waive immunity in the area of civil rights. *Notably, the* [*ELCRA*]*, which makes a municipality liable for specific civil rights violations, neither provides a cause of action for sexual orientation discrimination nor grants municipalities the authority to create one.* MCL 37.2101 *et seq*. Moreover, the [ELCRA] limits complaints to causes of action for violations of the act itself[.] [*Mack v Detroit*, 467 Mich 186, 196; 649 NW2d 47 (2002).]

[42] Defendants-Appellants' Brief on Appeal (October 22, 2021) at 14, quoting *Zarda v Altitude Express, Inc*, 883 F3d 100, 113 (CA 2, 2018).

sexual orientation. That is, sexual orientation may depend on sex, but sex does not depend on sexual orientation. Thus, sex and sexual orientation are not equivalent terms. A person need not know anything about another person's biological sex in order to know if that person has a homosexual orientation. For example, if an employer receives a referral that he "should hire Sam, who happens to be a homosexual," the employer could refuse to hire Sam because of his or her sexual orientation without ever even knowing Sam's biological sex. Knowledge about another person's biological sex is not necessary to influence one's actions toward that other person on the basis of his or her sexual orientation. These two terms simply are not interchangeable.

Consider the following hypothetical scenario provided by plaintiffs:

> A conference hall has four people request to use their facility on the same day at the same time. The conference hall only has two rooms available so the owner can only approve two of the four people to use the facility. The four people are a straight man, a gay man, a straight woman, and a gay woman. If the owner has a bias against the female "sex," then the owner will approve the requests of the straight man and the gay man. However, if the owner has a bias against a "sexual orientation," then the owner will approve the request of the straight man and the straight woman.[43]

As plaintiffs conclude, this illustrates that sex and sexual orientation are distinct concepts. Clearly, a bias rooted in gender produces one result, whereas a bias rooted in sexual orientation produces an entirely dif-

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[43] Plaintiffs-Appellees' Brief on Appeal (November 26, 2021) at 17.

ferent result.[44] Because the discriminatory results of these biases are different, it is abundantly clear that sex and sexual orientation are not the same.[45]

Defendants attempt to avoid this conflict by insisting on a cherry-picked, broader definition of sex, which they proffer contrary to statutory context. But they do not prevail even with that broader definition. Specifically, defendants rely on one of the possible meanings of "sex": "The sexual urge or instinct as it manifests

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[44] The majority opinion attempts to respond by once again asserting, with different phrasing, that "when [someone] discriminates against a person 'because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex.' " *Ante* at 426 n 16, quoting *Hively v Ivy Tech Community College of Indiana*, 853 F3d 339, 359 (CA 7, 2017) (Flaum, J., concurring). On that basis, the majority opinion concludes that discrimination "because of . . . sex" necessarily entails sexual-orientation discrimination. However, as I have shown, it is possible to make decisions based on sex alone and on sexual orientation alone, and that possibility fatally undermines the majority opinion's logic. See pages 446-451 of this opinion. More importantly, as I have explained at length, this Court's duty is *interpretation*: determining and then applying the meaning that the ELCRA possessed for the linguistic community that passed it into law. See pages 438-443 of this opinion. Nobody in 1976 thought that the ELCRA's prohibition of discrimination "because of . . . sex" included a prohibition on discrimination because of sexual orientation. And yet, today, a majority of this Court, "rather than members of [the Legislature]," sees fit to "impos[e] on a [nearly] half-century-old statute a meaning of 'sex discrimination' that the [Legislature] that enacted it would not have accepted," *Hively*, 853 F3d at 357 (Posner, J., concurring) (alterations added)—indeed, not only would not have accepted but *explicitly did not accept*. See pages 19-25 of this opinion for discussion of this point. Such an act is anathema to the judicial role and will seriously undermine Michigan's constitutional order if repeatedly indulged.

[45] See *Bostock*, 590 US at ___; 140 S Ct at 1835 (Kavanaugh, J., dissenting) (observing that to discriminate on the basis of sex as opposed to sexual orientation "implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions").

itself in behavior."[46] It is entirely unsurprising that a dictionary includes within its definition of "sex" the desire to engage in sexual activity. But this in no way proves that the ordinary meaning of the word "sex" in 1976, especially as that term was used in the ELCRA, included sexual orientation.

Instead of addressing the actual intent of the ELCRA's drafters, defendants inappropriately argue that the fact that there exists a definition for sex that has to do with sexual activity or behavior means that this meaning of the word must be included among the ELCRA's protections. However, there is no rule of construction suggesting that the Legislature must have intended all possible meanings of a word it used. On the contrary, statutory terms "must be interpreted on the basis of their ordinary meaning and the context in which they are used."[47]

The ELCRA was not enacted to protect the expression of sexual behavior or the act of sexual intercourse, which are possible meanings under defendants' preferred definition of sex. For example, no reasonable person would conclude that the ELCRA's prohibition on discrimination "because of . . . sex" would protect a person from being fired from his or her job for having sexual intercourse while at work, even though that is a possible meaning of "sex."[48] Context and intent matter

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[46] *American Heritage Dictionary* (1970); see also *American Heritage Dictionary* (1979) (same).

[47] *Zajaczkowski*, 493 Mich at 13. See also *Absurdity Doctrine*, 116 Harv L Rev at 2392-2393, 2457; *What Divides Textualists from Purposivists?*, 106 Colum L Rev at 78, 79-80.

[48] Rather, the ELCRA "is aimed at the prejudices and biases borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v C A Muer Corp*, 420 Mich 355, 363; 362

when interpreting statutes.[49] Just because courts may consult dictionaries for assistance does not mean they must robotically and blindly follow any and all of their definitions. This Court has always recognized and enforced this commonsense rule.[50]

When read in context it becomes eminently clear that the plain and ordinary meaning of the word "sex" in 1976 did not include sexual orientation.[51] This

NW2d 650 (1984) (quotation marks and citations omitted). Thus, that the ELCRA protects persons who engage in sexual activity while at work is simply not a reasonable interpretation.

[49] *Zajaczkowski*, 493 Mich at 13. See also *Absurdity Doctrine*, 116 Harv L Rev at 2392-2393, 2457; *What Divides Textualists from Purposivists?*, 106 Colum L Rev at 78, 79-80. Accord *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 307; 952 NW2d 358 (2020) ("[T]his Court will not extract words and phrases from within their context or otherwise defeat their import as drawn from such context. A statute should be interpreted in light of the overall statutory scheme, and although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context.") (quotation marks, citations, and brackets omitted).

[50] See, e.g., *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 238; 814 NW2d 646 (2012) ("When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme.").

[51] The majority opinion finds it notable that the ELCRA has been applied to circumstances "likely unanticipated" by the enacting Legislature. The majority opinion claims that this proposition in regard to the ELCRA is supported by *Robinson v Ford Motor Co*, 277 Mich App 146, 153; 744 NW2d 363 (2007), which first greenlighted claims under the ELCRA for a same-sex hostile work environment. See Gordon, *A History of the Development of Sex Discrimination Law in Michigan*, 97 Mich B J 30, 33 (2018). *Robinson* concerned a defendant employee who repeatedly committed unwelcome and depraved sexual acts against a plaintiff employee of the same gender. Regardless of either employee's sexual orientation, *Robinson* addressed actual sexual harassment that the ELCRA was intended, or anticipated, to prohibit.

conclusion is bolstered by the ELCRA's prepassage history, which shows that the Legislature specifically and explicitly considered adding, but ultimately declined to add, sexual orientation as a protected class in the ELCRA. Before the ELCRA became law, the director of the Detroit Human Rights Department (the DHRD) sent a letter to Representative Perry Bullard, then the chair of the Michigan House of Representatives' Civil Rights Committee (the Committee).[52] The DHRD's letter flagged what it took to be a flaw in the proposed language of the ELCRA (then House Bill 4055). Unlike the "Declaration of Rights" in the city of Detroit's new charter, HB 4055 did not include sexual orientation as a protected class. The East Lansing Human Relations Commission also sent a letter to Representative Bullard and the Committee, urging the addition of sexual orientation as a protected class. On June 5, 1975, the Committee held a roll-call vote on whether to include sexual orientation, and by a 5 to 3 vote, it declined to add that language. "On the day that the bill was scheduled to be voted out of committee," the committee room was filled with "gay[] and lesbian[] . . . advocates who . . . claim[ed] that the pro-

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The majority opinion simply chooses to ignore the longstanding rule of statutory interpretation that this Court is "aided in discovering legislative intent . . . by examining the proposed legislation [that the Legislature] considered and rejected, contrasted with the provisions as finally adopted." *Miller v State Farm Auto Ins Co*, 410 Mich 538, 566; 302 NW2d 537 (1981). And where, as here, the Legislature considered certain language and rejected it, we should not, indeed we cannot, read the statute to include that which the Legislature expressly rejected. See notes 78 and 79 of this opinion and associated text. Because the majority opinion reads into the ELCRA something that the Legislature expressly considered but rejected, it can only be characterized as a brazen act of judicial overreach.

[52] This document and related materials were submitted in the appendix to plaintiffs' brief on appeal.

posed law, as drafted, was short sighted" because it did not protect gays and lesbians.[53] Their appeal fell on deaf ears. One of the bill's cosponsors, Representative Mel Larsen, later admitted that it was very unlikely that the ELCRA would have made it out of the House had it been amended to include sexual orientation as a protected class.[54] The Legislature therefore made a political choice to not extend the ELCRA to prohibit sexual-orientation discrimination, and it did so with the understanding that, by not including sexual orientation as a protected class, discrimination on that basis would not be prohibited by the ELCRA.[55]

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[53] Gubbins, *Legal Milestone Honors Elliot[t]-Larsen Civil Rights Act*, Oakland County Legal News (September 17, 2012) <http://www.legalnews.com/oakland/1367237> (accessed July 23, 2022) [https://perma.cc/75K6-9NG3].

[54] Skubick, *Who is Elliott and Who is Larsen? Groundbreakers, That's Who*, MLive (November 23, 2014) <https://www.mlive.com/lansing-news/2014/11/ tim_skubick_who_is_elliott_and.html> (accessed July 23, 2022) [https://perma.cc/4HTQ-E9ZJ] (Representative Larsen "recall[ed] the movement was focused on the African American community. Period. . . . [W]hen the bill did pass, it came down to practical political calculus. Put gays in the measure and the whole thing implodes. Leave them out, and the bill passes.").

[55] Importantly, however, we know that the Legislature knows how to identify and protect sexual orientation when it wants to; but it did not do so, and to date has not done so, with the ELCRA. See MCL 28.257a (requiring "[t]he chief of police of each city or village, the chief of police of each township having a police department, and the sheriff of each county within this state" to "report to the department of state police, in a manner prescribed by the department, information specified under [MCL 28.251] related to crimes motivated by prejudice or bias based upon race, ethnic origin, religion, gender, or *sexual orientation*") (emphasis added). See also MCL 141.1361(10)(a) and (b) (prohibiting the board of directors of a regional convention facility authority created under MCL 141.1357 and the authority itself from discriminating against employees, applicants, or contractors "because of religion, race, color, national origin, age, sex, *sexual orientation*, height, weight, marital status, partisan considerations, or a disability or [certain] genetic information") (emphasis added). Such a linguistic difference—

Crucially, when discharging its interpretive responsibilities, this Court has recognized repeatedly that "where the Legislature has affirmatively rejected language that would support an interpretation of a statute, that rejection evidences a legislative intent toward a contrary construction."[56] Again, this Court's interpretive lodestar is the Legislature's intent, best evidenced by the words it chose to comprise a statute, and the

"sex" as opposed to "sexual orientation"—matters when it comes to discerning the Legislature's intended meaning. See *ACLU of Mich*, 509 Mich at 4-5, 15, 17 (unanimously holding that a statute, MCL 15.243(1)(d), that "exempt[s] from disclosure as a public record . . . [r]ecords or information specifically described and exempted from disclosure by statute" does not exempt from disclosure such records or information when the basis for that exemption is a *regulation* because "a regulation is not a statute," and the Legislature's "deliberate linguistic choice" to use "statute," which this Court was "bound to respect," matters and, indeed, was "dispositive").

Moreover, the Legislature knows how to expand, or clarify, what conduct constitutes discrimination "because of . . . sex." Indeed, the Legislature has twice expressly done so. First, it amended the ELCRA to provide that employment-based discrimination "because of . . . sex" includes discrimination because of pregnancy or childbirth, MCL 37.2201(d). And second, it amended the ELCRA to expressly state that discrimination because of sex includes sexual harassment, MCL 37.2103(*i*). Notably, it has not done so for sexual orientation.

[56] *LaGuire v Kain*, 440 Mich 367, 396-397 & n 21; 487 NW2d 389 (1992) (BOYLE, J., concurring in part), citing *People v Petrella*, 424 Mich 221, 243-244; 380 NW2d 11 (1985); *Miller*, 410 Mich at 567; *Gen Teamsters Union v Uptown Cleaners & Hatters, Inc*, 356 Mich 204, 240; 97 NW2d 593 (1959); *People v Adamowski*, 340 Mich 422, 429; 65 NW2d 753 (1954); and *Miles ex rel Kamferbeek v Fortney*, 223 Mich 552, 564; 194 NW 605 (1923). See also *Wayne Co v Auditor General*, 250 Mich 227, 235-236; 229 NW 911 (1930) (in construing an act for the distribution of highway funds, this Court stated: "The legislative history of the 1927 act reveals the fact that while it was pending in the legislature, a proposed amendment was rejected which, if embodied in the act, would have rendered it subject to plaintiff's interpretation and not to that of the defendant. Surely this gives rise to the inference that the legislature did not intend the act should be subject to the interpretation now urged by plaintiff") (citation omitted).

Court is "aided in discovering legislative intent . . . by examining the proposed legislation [that the Legislature] considered and rejected, contrasted with the provisions as finally adopted."[57] And, "[w]here the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected."[58] The Supreme Court of the United States has held similarly, explaining that a congressional committee's deletion of a provision from a bill under consideration strongly militates against a judgment that Congress intended a result it had expressly declined to enact.[59] Relatedly, "[f]ew principles of statutory construction are more compelling than the proposition that [the Legislature] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[60]

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[57] *Miller*, 410 Mich at 566. Accord *Nation v W D E Electric Co*, 454 Mich 489, 497; 563 NW2d 233 (1997) ("In light of the Legislature's rejection of an explicit provision requiring compound interest, we presume the Legislature's silence evidences an intent that courts continue to use simple interest.").

[58] *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999), citing *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994). Accord *Bush v Shabahang*, 484 Mich 156, 173-174; 772 NW2d 272 (2009). See also *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 140; 369 NW2d 277 (1985) (holding that the legislative history of a statute may be considered, and if it can be shown that certain language was affirmatively rejected, a court should not give the statute a construction that the Legislature plainly refused to give it); *Elliott v Genesee Co*, 166 Mich App 11, 17; 419 NW2d 762 (1988).

[59] *Gulf Oil Corp v Copp Paving Co, Inc*, 419 US 186, 200; 95 S Ct 392; 42 L Ed 2d 378 (1974).

[60] *Immigration & Naturalization Serv v Cardoza-Fonseca*, 480 US 421, 442-443; 107 S Ct 1207; 94 L Ed 2d 434 (1987) (quotation marks and citation omitted).

As this Court has explained, the highest quality legislative history

> include[s] actions of the Legislature intended to repudiate the judicial construction of a statute, see, e.g., *Detroit v Walker*, 445 Mich 682, 697; 520 NW2d 135 (1994), or *actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted*. See, e.g., [*Miles ex rel Kamferbeek*, 223 Mich at 558]. From the former, a court may be able to draw reasonable inferences about the Legislature's intent, even when the Legislature has failed to unambiguously express that intent. *From the latter, by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted.*[61]

These principles of statutory interpretation are dispositive for properly interpreting the ELCRA, and the majority opinion errs by ignoring them in favor of a myopic focus on an erroneous understanding of the original meaning of the ELCRA's text, taken without

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[61] *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) (emphasis added). Just last year, this Court unanimously held that reviewing such statutory history is extremely valuable. See *Dep't of Talent & Economic Dev / Unemployment Ins Agency*, 507 Mich at 227 ("A statute's history—the narrative of the statutes repealed or amended by the statute under consideration—properly form[s] part of [its] context.") (quotation marks and citations omitted). See also *Bush*, 484 Mich at 173-174 ("[W]here the Legislature has considered certain language and rejected it in favor of other language, *the resulting statutory language should not be held to authorize what the Legislature explicitly rejected*.") (emphasis added; quotation marks and citation omitted).

For purposes of this dissent, there is no meaningful distinction between the kind of legislative history I am considering, on the one hand, and statutory history, on the other. Whatever labels we might apply to the Committee's consideration but ultimate rejection of including sexual orientation as a protected class in the ELCRA, there can be no doubt that we can—and indeed must, if we are faithfully to interpret the ELCRA consistently with the Legislature's intent—consider it.

due consideration of the historical-linguistic context from which the phrase at issue arose.[62]

My interpretation of the ELCRA is not a novel one. Neither the MCRC nor the MDCR, the institutional actors entrusted with enforcing the ELCRA and who

[62] Justice VIVIANO persuasively demonstrates that the majority opinion's but-for causation test is inapplicable because the threshold requirement of discriminatory animus has not been met, and, in the alternative, even if the test is appropriate, the majority opinion misapplies it. To his thorough analysis, I would add the following. The majority opinion makes much ado about the role played by "because of" in its interpretation of the ELCRA. The majority opinion holds that "the operative phrase 'because of' in the ELCRA establishes a but-for causation standard," just as the Supreme Court of the United States held "because of" does in Title VII when it decided *Bostock*. *Ante* at 420. "[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 590 US at ___; 140 S Ct at 1739. Thus, for the majority opinion, the ELCRA prohibits, and always has prohibited, sexual-orientation discrimination because "a person's sexual orientation necessarily implies conclusions about their sex, and so 'it is impossible to discriminate against a person' for their sexual orientation 'without discriminating against that individual based on sex.' " *Ante* at 425, quoting *Bostock*, 590 US at ___; 140 S Ct at 1741.

Ordinarily, that "because of" means but-for causation would not be terribly controversial; that is a reasonable, but not a necessary, construction of the phrase. See *Hrapkiewicz v Wayne State Univ Bd of Governors*, 501 Mich 1067, 1067, 1069 (2018) (MARKMAN, C.J., dissenting) (explaining that because this Court's caselaw has produced "inconsistent" interpretations of the ELCRA's causation standard, the Court should "grant leave to appeal to address whether the 'because of' language in MCL 37.2202(1)(a) [of the ELCRA] should be interpreted" as imposing but-for causation); *Price Waterhouse v Hopkins*, 490 US 228, 240; 109 S Ct 1775; 104 L Ed 2d 268 (1989) (plurality opinion; superseded by statute on other grounds) ("To construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them.") (comma omitted). But, as discussed earlier, the ELCRA's prepassage history directs us to read "because of" consistently with the Legislature's intent not to include sexual orientation as a protected class under the ELCRA. That prepassage history limits the scope of "because of"—a limit that this Court must respect as an interpretive, not a legislative, body.

have a natural, vested interest in pursuing more expansive, aggressive interpretations of it,[63] understood the ELCRA to prohibit sexual-orientation discrimination until 2018. In 1977, the same year that the ELCRA became effective, the MCRC published a "Sexual Orientation Report and Recommendations."[64] In a 2013 report, the MCRC, discussing that 1977 report, stated that "[p]erhaps the most significant conclusion reached in [the 1977] report was the [MCRC's] statement that the [MDCR] would not handle sexual orientation discrimination cases. The [MCRC] cited a lack of jurisdiction until the State legislature specifically authorized such an addition to its powers under ELCRA."[65] In 1983, the MCRC issued

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[63] See *Chadha*, 634 F2d at 422-423 (observing that the separation of powers' "goal of preventing undue concentrations of power is furthered by the natural tendency of each center of power [i.e., branch of government] to compete to enlarge or maintain its own influence" and that "[a]n undue concentration of authority in one branch inevitably causes structural decomposition of the other branches, along with a dispersion of their original powers"). See also The Federalist No. 51 (Madison) (Rossiter ed, 1961), pp 318-319 (explaining how to prevent each branch, which naturally "wants" to dominate its co-branches, from doing so: "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place").

[64] See Appendix to Plaintiffs-Appellees' Brief on Appeal at 83a (discussing that 1977 report).

[65] MDCR, *Report on LGBT Inclusion under Michigan Law with Recommendations for Action* (January 28, 2013), p 5, available at <https://www.michigan.gov/-/media/Project/Websites/mdcr/mcrc/reports/2013/lgbt-inclusion.pdf?rev=2f4b1e824be04de7b2d0bec9a607b6bf> (accessed July 24, 2022) [https://perma.cc/HL6P-S8NJ].

a statement saying that the ELCRA should be amended to prohibit sexual-orientation discrimination.[66] And in 2013, the MCRC issued the aforementioned "Report on LGBT Inclusion Under Michigan Law with Recommendations for Action," which reaffirmed the MCRC's original, longstanding position, held since the ELCRA became effective in 1977, that the ELCRA does not prohibit sexual-orientation discrimination.[67] While an agency's interpretation of a statute is, of course, not binding on us,[68] we should not treat it, as the majority opinion does, as though it is no evidence at all of a statute's meaning.[69] Defendants cannot admit that, for more than 40 years, the MCRC openly acknowledged that it did not understand "sex"

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[66] *Id*.

[67] *Id*. at ii ("While ELCRA prohibits employment, public accommodations, public services, education, and housing discrimination based on race, religion, color, national origin, sex, age, marital status, height, weight, and arrest record, *it does not currently prohibit discrimination based on sexual orientation* or gender identity/expression.") (emphasis added).

[68] *In re Complaint of Rovas*, 482 Mich at 100 (stating that agencies cannot "assume this Court's constitutional role as the final arbiter of the meaning of a statute").

[69] See *id*. at 103, quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935) (explaining this Court's approach to an agency's interpretation of a statute: " 'the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, *the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature*' ") (emphasis added; alteration in *Rovas*).

to include sexual orientation,[70] and then in the same breath argue that it is suddenly plain and obvious that it does—indeed, that it always has.[71]

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[70] In addition to the actions of the MCRC, those of former Governor Jennifer Granholm are instructive because they demonstrate the widespread, commonsense understanding that discrimination based on sex is not the same as discrimination based on sexual orientation. As Governor Gretchen Whitmer stated in Executive Order No. 2019-09, "[d]iscrimination based on sexual orientation was prohibited in state employment for the first time by Executive Directive 2003-24." Former Governor Granholm promulgated Executive Directive No. 2003-24, which explicitly enumerates sexual orientation as a protected class. See *id*. (prohibiting discrimination "because of religion, race, color, national origin, age, sex, *sexual orientation*, height, weight, marital status, partisan considerations, or a disability or [certain] genetic information") (emphasis added). In 2004, "[t]his prohibition was incorporated by the Civil Service Commission in its Rule 1-8.1 on prohibited discrimination . . . ." EO 2019-09, citing Civ Serv R 1-8.1, p 5.

Executive Directive No. 2003-24 and Civil Service Rule 1-8.1 expressly added sexual orientation as a new, separately prohibited form of discrimination. In promulgating those executive actions, Governor Granholm's administration did not assert that language prohibiting discrimination "because of . . . sex" in prior executive actions "already banned, or henceforth would be deemed to ban, sexual orientation discrimination[.]" *Zarda*, 883 F3d at 152 n 22 (Lynch, J., dissenting). Instead, her administration deployed the phrase explicitly to accomplish her goal of prohibiting sexual-orientation discrimination in state employment. This shows that Michigan's executive branch, like our Legislature, has, consistently with my interpretation of the ELCRA, "long understood sexual orientation discrimination to be distinct from, and not a form of, sex discrimination." *Bostock*, 590 US at ___; 140 S Ct at 1831 (Kavanaugh, J., dissenting).

[71] Historically, Michigan legislators have been on the same page as defendants in their understanding that the ELCRA does not prohibit sexual-orientation discrimination. Since the ELCRA became effective in 1977, there have been numerous proposals to amend it to include sexual orientation. In 1980, just a few years after the ELCRA was enacted, Representative David Evans organized a statewide citizens' task force to discuss amending the ELCRA to include that language. See MDCR *Report on LGBT Inclusion* at 5. A few years after that, in 1983, Representative James Dressel introduced a bill—the "Dressel Amendment" (HB 5000)—to amend the ELCRA to include sexual orientation.

See Lindstrom, *Remembering a Pioneering Moment in Gay Rights in the Legislature*, Gongwer (March 7, 2013) <https://www.gongwer.com/blog/?postid=6001> (accessed July 24, 2022) [https://perma.cc/D9NY-4GFC]. In 2005, Representative Chris Kolb introduced a bill to amend the ELCRA to prohibit both sexual-orientation and gender-identity discrimination. See Miller, *Once Promising, Kolb's LGBT Bills Fizzle*, The Michigan Daily (February 14, 2006) <https://www.michigandaily.com/uncategorized/once-promising-kolbs-lgbt-bills-fizzle/> (accessed July 24, 2022) [https://perma.cc/P926-8RH9]. A similar effort was made in 2014, when Representative Frank Foster introduced a bill that would have added sexual orientation to the ELCRA. See Oosting, *'Historic' Gay Rights Hearing Ends Without Vote on Michigan Anti-Discrimination Proposals*, MLive (December 3, 2014) <https://www.mlive.com/lansing-news/2014/12/historic_hearing_on_gay_rights.html> (accessed July 24, 2022) [https://perma.cc/L93S-BXGJ] (quoting Foster acknowledging that some states "already have this type of legislation, *some as far back as the 1970s*") (emphasis added). All told, since 1990, the Legislature has considered, and rejected, 22 bills that would have added sexual orientation to the ELCRA. See 2021 SB 208, 2021 HB 4297, 2019 SB 351, 2019 HB 4997, 2017 SB 424, 2017 HB 4689, 2015 SB 0315, 2015 HB 4538, 2014 SB 1053, 2014 HB 5959, 2014 HB 5804, 2012 SB 1063, 2009 HB 4192, 2007 HB 4160, 2005 SB 787, 2005 HB 4956, 2003 SB 609, 2003 HB 4850, 2001 HB 4661, 1999 HB 5107, 1992 HB 6222, and 1990 HB 5993.

While the majority opinion correctly notes that there are myriad reasons why legislators might have wanted to amend the ELCRA, we cannot and should not rule out the most obvious and straightforward explanation: as competent users of the English language, they fully believed that, as written, the ELCRA did not prohibit what they wanted it to prohibit, which is precisely why they tried to amend it. This postenactment history is not dispositive as to the ELCRA's original public meaning, but it is certainly not, per the majority opinion's characterization, evidence that is hopelessly inscrutable.

Moreover, the public has not understood the ELCRA to prohibit sexual-orientation discrimination. In 2020, some Michiganders launched a ballot initiative that would have extended the ELCRA's protections to cover sexual orientation and gender identity. See Knoppow, *New Coalition Seeks to Amend ELCRA via Citizen Initiative*, PrideSource (January 16, 2020) <https://pridesource.com/article/new-organization-seeks-to-amend-elcra-via-citizen-initiative/> (accessed July 24, 2022) [https://perma.cc/R4C7-QWMQ]. This ballot-initiative

Finally, by consulting the Corpus of Historical American English (the COHA),[72] we have strong evidence that the 1970s public understood that the ELCRA would prohibit sex discrimination—differential, negative treatment of members of one sex vis-à-vis members of the other sex[73]—not sexual-orientation discrimination. Availing ourselves of a relatively new tool of statutory interpretation, corpus linguistics,[74] and performing a search for "sex discrimination"—which is what the ELCRA declares unlawful—we note that every single one of the 20 search results generated for the decade preceding the ELCRA's passage into law (i.e., 1966–1976) pertains to differential, negative treatment of persons in terms of gender. There are no

effort failed. See *Fair & Equal Mich v Bd of State Canvassers*, 508 Mich 967 (2021) (denying the plaintiff's complaint for mandamus, sought in response to the Board of State Canvassers' unanimous conclusion that the plaintiff's petition to add sexual orientation and gender identity to the ELCRA did not garner sufficient signatures to be placed on the ballot). Even so, like the legislators who attempted to amend the ELCRA to include sexual orientation after it became law, the most obvious and straightforward explanation for why these citizens started a ballot initiative to amend the ELCRA is that they believed that the ELCRA did not prohibit what they wanted it to prohibit: sexual-orientation discrimination.

[72] The COHA is a database of nearly 406 million words and around 107,000 English texts—newspapers, popular magazines, fiction and nonfiction books—published between 1810 and 2009. See Alatrash et al, *CCOHA: Clean Corpus of Historical American English*, Proceedings of the 12th Conference on Language Resources and Evaluation (May 2020), pp 6958-6959, available at <https://aclanthology.org/2020.lrec-1.859.pdf> (accessed July 24, 2022) [https://perma.cc/XFR3-CQ6Z].

[73] See note 40 of this opinion (citing and discussing *Radtke*, 442 Mich at 379; *Diamond*, 265 Mich App at 683; *Oncale*, 523 US at 80, quoting *Harris*, 510 US at 25 (Ginsburg, J., concurring); *On the Basis of Identity*, 43 Harv J L Pub Pol'y at 390; *Weinberger*, 420 US at 654).

[74] This Court has used this method previously. See *Harris*, 499 Mich at 347-349.

references to sexual-orientation discrimination in any of those COHA search results. Not even a hint.

For these reasons, it is a clear violation of the Michigan Constitution's separation of powers for this Court to add by judicial fiat a category to the ELCRA that was specifically rejected by the enacting Legislature and understood for more than 40 years to not exist in the ELCRA by the governmental institutions principally charged with enforcing it, not to mention a former governor, numerous legislators, and informed members of the public.[75] Consequently, we should not read the ELCRA to accomplish something that it plainly and indisputably would have accomplished had sexual orientation been expressly included in it, especially when we know that the Legislature knew how to

[75] The majority opinion relies on *Oncale*, 523 US at 79, for its expansive reading of the ELCRA. But this reliance is misplaced. *Oncale* stated that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils" and that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. It is unremarkable that a statutory provision might cover circumstances that its enactors did not clearly foresee would arise or even ones that they did not specifically intend for it to cover. For example, given the social conditions of the historical moment in which the ELCRA was passed, most legislators probably thought that the ELCRA's prohibition on discrimination "because of . . . sex" would help (only) women, at least as a practical matter. But that does not change the reality that the reasonable import of the ELCRA's words also obviously applies to men, and we cannot limit their scope based on what legislators thought they were accomplishing because the plain and reasonable meaning of those words covers men as well as women. But that is not the case with sexual orientation. As I have been at pains to demonstrate, to discriminate based on sex as opposed sexual orientation "implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions." *Bostock*, 590 US at ___; 140 S Ct at 1835 (Kavanaugh, J., dissenting). Thus, the two forms of discrimination are not "reasonably comparable evils," *Oncale*, 523 US at 79, in the same way that discrimination based on sex—regardless of which sex it is perpetrated against—is.

achieve that goal if it had wanted to achieve it, given that it has done so in other statutes.[76]

That the Legislature considered adding sexual orientation to the ELCRA but ultimately chose not to do so materially distinguishes this case from *Bostock*, on which the majority opinion is patterned,[77] thereby requiring a different outcome. Unlike the 88th Congress (1963–1965) that passed Title VII, our Legislature, in its 78th legislative session (1975–1976), is known to have explicitly considered, but ultimately rejected, adding sexual orientation as a protected class under the ELCRA. Why it did not include sexual orientation, even if such information could be known with confidence, is irrelevant. When the Legislature "has considered certain language and rejected it in favor of other language, *the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected*."[78] That is precisely the situation here. Thus, this Court should not read the ELCRA to cover something that the Legislature specifically and explicitly did not craft it to cover.[79] To

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[76] See MCL 28.257a; MCL 141.1361(10)(a) and (b).

[77] See *ante* at 421-422 (stating that *Bostock* "offers a straightforward analysis of the plain meaning of analogous statutory language" and "agree[ing] with its reasoning"); see also *ante* at 422 n 12 (further defending its reliance on *Bostock*).

[78] *In re MCI Telecom Complaint*, 460 Mich at 415 (emphasis added).

[79] The majority opinion takes the position that because only a subset of the Legislature—the Committee, not a majority of the Legislature or the entire Legislature—made the choice to exclude sexual orientation as a protected class under the ELCRA, its exclusion by the Committee has no bearing on a proper interpretation of the ELCRA. This is incorrect. For one thing, the 1975–1976 Legislature itself chose the committee system as its decision-making mechanism. We should not ignore that choice, especially when we have relied on less compelling evidence than we have here to inform our understanding of a statute's meaning. See *People v Arnold*, 502 Mich 438, 460-462, 468; 918 NW2d 164 (2018) (in

hold otherwise runs afoul of the people's right to govern themselves through their elected representatives in the Legislature.

III. CONCLUSION

This Court's function is to interpret and apply the laws that the Legislature writes. That is not what the majority opinion has done. Instead, it analyzes the words of the ELCRA in a vacuum, stripped from their

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deciding whether to construe the phrase "1 day to life" in MCL 750.335a(2)(c) as a mandatory or as an optional alternative, the Court looked to how the phrase was understood by the "Governor's Study Commission on the Deviated Criminal Sex Offender," which in 1949 was appointed by then Governor G. Mennen Williams to offer recommendations to amend the second Goodrich Act, 1939 PA 165, some of which the Legislature adopted).

Moreover, it is absurd to say that because only the Committee's eight members explicitly voted on whether to include sexual orientation in the ELCRA, we therefore cannot know what any other legislators thought of the phrase's resulting absence in the bill. The Committee is not hermetically sealed off from the rest of the Legislature; its members' actions are known to the other legislators. The Committee's decision not to include sexual orientation in the ELCRA, therefore, would have been common knowledge to the rest of the Legislature, whose members are competent users of the English language. For the reasons I have explained, the choice to exclude sexual orientation strongly militates against reading the ELCRA to cover it. See *LaGuire*, 440 Mich at 396-397 (BOYLE, J., concurring in part) ("[W]here the Legislature has affirmatively rejected language that would support an interpretation of a statute, that rejection evidences a legislative intent toward a contrary construction."); *id*. at 397 n 21 (collecting cases in support); *Miller*, 410 Mich at 566 (explaining that the Court is "aided in discovering legislative intent . . . by examining the proposed legislation [that the Legislature] considered and rejected, contrasted with the provisions as finally adopted"); *In re MCI Telecom Complaint*, 460 Mich at 415 ("Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected."). See also *Bush*, 484 Mich at 173-174; *Univ Med Affiliates, PC*, 142 Mich App at 140; *Elliott*, 166 Mich App at 17.

relevant and critical historical-linguistic context—context that is necessary to make them fully intelligible and to preserve Michiganders' right to self-government and the constitutional separation of powers. Seizing on the words of the ELCRA in isolation, the majority opinion is thereby able to declare them to mean something that nobody for more than 40 years seriously believed that they meant. The best interpretation of the ELCRA, in light of the available evidence about its original public meaning, is that its prohibition on discrimination in public accommodations "because of . . . sex" does not encompass a prohibition on sexual-orientation discrimination. This is all the more obvious given that the Legislature specifically and explicitly considered including sexual orientation as a protected class under the ELCRA but ultimately did not. Though I take no issue with today's outcome, because I do not recognize the manner in which it has been achieved by the majority opinion to be faithful to the judicial role, I dissent.

VIVIANO, J. (*dissenting*). Justice ZAHRA's thorough dissent cogently explains why the original public meaning of "sex" when the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*., was passed did not and could not encompass "sexual orientation." I agree with the conclusion he reaches. I write separately, however, to explain how the majority mangles another aspect of the ELCRA. The relevant statutory provision, MCL 37.2302(a), prohibits certain discriminatory actions taken "because of . . . sex," among other things. Properly interpreted, this requires that the defendant maintain some prejudice, bias, animus, or belief about "sex" or the other characteristics protected by the statute. In other words, when someone discriminates against another person "because of" that person's

"sex," the discrimination results from a belief about or animus against that person's sex. Only once this threshold element is satisfied does one need to consider the degree to which that belief or animus motivated the defendant, e.g., whether the discriminatory motive must be a but-for cause.

Here, that threshold is not satisfied: discrimination on the basis of one's sexual orientation is not discrimination because of some prejudice, bias, animus, or belief about the male sex or the female sex. Consequently, we need not decide whether to adopt a but-for standard. But even if that standard applied, the majority still reaches the wrong outcome. A proper application of the but-for test takes into account the defendant's motive. That means where, as here, no belief or animus about biological sex has been shown, "sex" cannot be a but-for cause of discriminatory actions. Accordingly, I dissent.

I. THE TEXT REQUIRES A DISCRIMINATORY MOTIVE

The ELCRA's general provision states:

> The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right. [MCL 37.2102(1).]

Other sections more fully implement this provision. The section that Rouch World allegedly violated is MCL 37.2302:

> Except where permitted by law, a person shall not:

> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.[1]

The relevant inquiry is whether an individual is subject to certain adverse actions "because of" his or her "sex." MCL 37.2302(a).

I believe that the majority's decision today, by myopically focusing on the term "because of," fails to adequately account for the original meaning of the full text of MCL 37.2302(a). The statute requires a link between the specified discriminatory actions and a specified protected class or characteristic. When the entire section is considered, it is clear that the connection must be the defendant's discriminatory motive or intent, i.e., he or she must take the discriminatory action because of some belief or animus with regard to the protected characteristic. The but-for test might

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[1] Another section contains similar language against employer discrimination:

> An employer shall not do any of the following:
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> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system. [MCL 37.2202(1).]

still fit within this framework, explaining the degree to which the belief or animus must motivate the defendant. But it is unnecessary to decide whether the but-for test or some alternative standard (such as the motivating-factor test, discussed below) applies when a discriminatory motive or intent has not been established. Put differently, to run afoul of the statute, a defendant must have some belief or prejudice about the protected characteristic that prompts him or her to act. Only then is it appropriate to ask how much of a role this motivation played in the action.

A. TEXTUAL ANALYSIS

The majority today eschews any focus on intent and, in doing so, departs from the ordinary meaning of the statute. Following the lead of the United States Supreme Court, the majority here finally adopts the but-for gloss on "because of." The centerpiece of this analysis comes from *Bostock v Clayton Co*, 590 US ___, ___; 140 S Ct 1731, 1739; 207 L Ed 2d 218 (2020):

> And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. 338, 350 [133 S Ct 2517; 186 L Ed 2d 503] (2013) (citing *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176 [129 S Ct 2343; 174 L Ed 2d 119] (2009); quotation altered). In the language of law, this means that Title VII's "because of" test incorporates the " 'simple' " and "traditional" standard of but-for causation. *Nassar*, 570 U. S., at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U. S., at 176. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

> This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U. S. 204, 211–212 [134 S Ct 881; 187 L Ed 2d 715] (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid*.; *Nassar*, 570 U. S. at 350.

The first term to consider in MCL 37.2302(a) is "because of." The dictionary definition of that term is "by reason of; on account of." *American Heritage Dictionary* (2d college ed, 1982), p 166. See also *Webster's New Collegiate Dictionary* (1976), p 98 (same); *The Random House Dictionary of the English Language: Second Unabridged Edition* (1987) (defining "because of" as "by reason of; due to"), p 184; *The Oxford English Dictionary* (2d ed, 1989), p 41 (defining "because of" as, relevantly, "[b]y reason *of*, on account *of*"). "Reason" is relevantly defined as "a basis or cause, as for some belief, action, fact, event, etc. . . ." *The Random House Dictionary of the English Language: Second Unabridged Edition* (1987). Thus, a person can be said to take an action "because of" sex when sex was a "cause" or "basis" of the person's act.

The words "cause" and "basis" do a lot of work here. "Cause" is defined as "the reason or motive for some human action[.]" *Id*. Put differently, it is "[a] fact, condition of matters, or consideration, moving a person to action; ground of action; reason for action, motive." *The Oxford English Dictionary* (2d ed, 1989). Thus, based purely on dictionary definitions, sex is a "cause" when it is the reason, motive, or intent behind the

person's action—when it is the fact or consideration that leads a person to take an action. "Basis" is similarly defined as "the groundwork or first principle; that which supports; foundation . . . ." *Webster's New Twentieth Century Dictionary: Unabridged* (2d ed, 1977). Sex is the "basis" for an act, then, when it supports or provides a foundation for the act—thus, when the act is discriminatory, sex is the basis when the actor has a prejudice, bias, animus, or belief with regard to a person's sex.

That the motive or intent must constitute a prejudice, bias, or animus against the protected characteristic is readily apparent from the broader statutory context. Although the ELCRA does not contain the phrase "discriminate against"—which is found in the federal counterpart, 42 USC 2000e-2(a)(1)—the requirement of discriminatory animus is inherent in MCL 37.2302(a).[2] Indeed, the general ELCRA provision, MCL 37.2102(1), expressly prohibits "discrimination because of" various protected characteristics. MCL 37.2302(a) effectuates this prohibition with regard to certain public accommodations. As noted, this provision states that a person shall not "[d]eny an individual the full and equal enjoyment of" certain services, goods, or accommodations. MCL 37.2302(a). To "discriminate" means "to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs rather than according to actual merit; show partiality[.]" *The Random House Dictionary of the English Language: Second Unabridged Edition* (1987), p 564. To deny someone access to the goods, services, or

[2] The federal statute makes it unlawful to "discriminate against any individual with respect to [employment matters] . . . because of such individual's . . . sex[.]" 42 USC 2000e-2(a)(1).

accommodations on the basis of his or her sex is obviously a form of discrimination, i.e., it is making a distinction against the person on the basis of the person's sex. Therefore, while MCL 37.2302(a) lacks the phrase "discriminate against," the statute's language means essentially the same thing but is stated more specifically with regard to how the discrimination would occur, i.e., the denial of the good, service, or accommodation.[3]

Discrimination naturally requires a prejudice, bias, animus, or some belief about a protected class or characteristic. As one scholar has noted, the term "discriminate" is often used with "prejudice," demonstrating a semantic link between the two words. Phillips, *The Overlooked Textual Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality* (May 11, 2020) (unpublished manuscript), p 5, available at <https://www.supremecourt.gov/opinions/URLs_Cited/OT2019/17-1618/17-1618-3.pdf> (accessed July 24, 2022). Dictionaries from the relevant period frequently defined "discriminate against" in a manner that "refers to mistreatment based on *prejudice directed at* members of a discrete *group*."[4] Thus, dis-

[3] This conclusion is further supported by MCL 37.2103(i), which is part of the general definitions section applicable to all of ELCRA. That provision states, "[d]iscrimination because of sex includes sexual harassment . . . ." "Sexual harassment" is defined to include conduct that "substantially interfere[s] with an individual's . . . public accommodations or public services . . . ." MCL 37.2103(i)(*iii*). In this light, then, the definitional section, MCL 37.2103(i), indicates that the actions prohibited by MCL 37.2302(a) constitute discrimination against a person.

[4] *Overlooked Textual Evidence*, p 5. As Phillips states:

> For instance, Funk & Wagnalls Standard College Dictionary (10th ed. 1963) defines *discriminate* as "[t]o act toward someone or something with partiality or prejudice: to *discriminate against* a minority; to discriminate in favor of one's friends." Likewise, Webster's New World Dictionary (1960), defines the relevant

crimination against a person "because of . . . sex," the scholar concluded, "refers only to adverse treatment that rests on *prejudice (or bias)—i.e., loose generalizations or other unfair beliefs, attitudes (indifference, discounting of interests, distaste, antipathy, etc.)—directed at some or all men, or at some or all women*." *Id*. at 3.

Accordingly, the ELCRA focuses on the motives and beliefs of the defendant with regard to the characteristic at issue. The question in a sex-discrimination case, then, is "whether the defendant employer took a particular adverse employment action against a particular female employee because she is a woman or against a particular male employee because he is a man." *Hively v Ivy Tech Community College of Indiana*, 853 F3d 339, 365 (CA 7, 2017) (Sykes, J., dissenting).

B. CASELAW

Our caselaw provides ample support for the conclusion that the ELCRA requires the defendant to maintain a discriminatory motive concerning the characteristics protected by the statute. This motive represents a prejudice, bias, animus, or belief concerning the characteristic itself or people with the characteristic.

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sense of *discriminate* as "to make distinctions in treatment; show partiality (*in favor of*) or *prejudice* (*against*)." The idea of prejudice or bias against members of a certain group is also present in dictionary definitions emphasizing that discrimination involves action based on someone's membership in a group "rather than according to actual merit." [*Id*. at 5-6, quoting *The Random House Dictionary* (1966–1973).]

Phillips further notes that *Webster's Third International Dictionary* (1961) defines "discriminate" as " 'to make a difference in treatment or favor *on a class or categorical basis in disregard of individual merit* ([discriminate] in favor of your friends) (habitually *[discriminate] against* a certain nationality).' " *Id*. at 6 n 19.

As this Court has observed, the ELCRA and similar statutes "are addressed to 'the prejudices and biases' one race, sex, or religion bears against another." *Boscaglia v Mich Bell Tel Co*, 420 Mich 308, 316; 362 NW2d 642 (1984) (citation omitted). We have similarly observed that the ELCRA "seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v C A Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984).

These prejudices and biases are necessarily aimed at the protected characteristics and statuses listed in the statute. In holding that "[t]he clear, unambiguous language of [the ELCRA] protects status, not conduct," we have explained that the statute requires "evidence of discrimination based on one of the protected characteristics" or some "link between the conduct [the plaintiff engaged in] and a protected status." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160, 165-166; 645 NW2d 643 (2002). Elaborating, we described the "direct function of the words 'because of' " as follows: the ELCRA "merely prohibits actions that are taken *with regard* to certain types of statuses, '*because of*' these characteristics. *It does not prohibit actions that are legitimately taken for any other reason*." *Id*. at 165 n 7 (some emphasis added). Thus, the statute proscribes discrimination that arises from prejudices or biases against one of the listed characteristics or statuses.

In keeping with this understanding, our caselaw has, until today, always stressed that the discriminatory action must be causally linked to the defendant's motives and intent. This is true even though we have—again, until today—never finally settled on a test for determining the degree to which those motives must explain (i.e., be causally related to) the discrimi-

natory action. We have sometimes favored a but-for test and sometimes a motivating-factor test. See *Hrapkiewicz v Wayne State Univ Bd of Governors*, 501 Mich 1067, 1067-1069 (2018) (MARKMAN, C.J., dissenting) (discussing the caselaw).

It appears that our first case to mention the but-for standard was *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986). That age-discrimination case was originally brought under the ELCRA's predecessor (which lacked a provision on sex discrimination), the Fair Employment Practices Act (FEPA), MCL 423.301 *et seq*.[5] As *Matras* demonstrates, we have long understood that discrimination cases require discriminatory motive:

> A jury can find that the discharge was "because of age" even if age was not the sole factor. As accurately expressed in the Michigan Standard Jury Instruction, "[age] does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to [discharge] the plaintiff." *Another formulation would be that age is a determining factor when the unlawful adverse action would not have occurred without age discrimination*. Alternative expressions of the determining factor concept are "but for causation" or "causation in fact."
>
> *In the instant case, the question therefore becomes whether there was sufficient evidence, when the evidence and inferences therefrom are viewed in a light most favorable to Matras, for reasonable jurors to conclude that age discrimination was a determining factor in the decision to discharge him*. [*Matras*, 424 Mich at 682-683 (emphasis added; citations omitted; alterations in original).]

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[5] "The FEPA was repealed upon passage of the [ELCRA], 1976 PA 453, effective March 31, 1977[.]" *Dep't of Civil Rights ex rel Parks v Gen Motors Corp*, 93 Mich App 366; 287 NW2d 240 (1979).

We offered varying formulations of the test—"made a difference," "determining factor," and "but-for causation"—but embedded in each was the notion that discriminatory motive is critical.

Other cases applying a but-for test likewise indicate that the defendants' motives are a key element. In *Radtke v Everett*, 442 Mich 368, 383-384; 501 NW2d 155 (1993), for example, the plaintiff alleged sexual "harassment on the basis of sex" when her employer allegedly held her down and tried to kiss her. The defendant argued that his conduct was not sexual but romantic. Rejecting this, we stated that "plaintiff need only show that 'but for the fact of her sex, she would not have been the object of harassment.' " *Id*. at 383 (citation omitted). In concluding that she had made this showing, we stated, "The overtures at issue were certainly inferentially sexually motivated: but for her womanhood, Everett would not have held plaintiff down and attempted to solicit romance, if not sex, from her." *Id*. at 384. While this applies the but-for test, it shows that the test cannot be used without consideration of the defendant's motivation.

More recently, in *Hecht v Nat'l Heritage Academies, Inc*, we stated: "The ultimate question in an employment discrimination case is whether the plaintiff was the victim of intentional discrimination. In our caselaw, we have interpreted the CRA to require ' "but for causation" or "causation in fact." ' We reaffirm that construction here." *Hecht*, 499 Mich 586, 606; 886 NW2d 135 (2016), quoting *Matras*, 424 Mich at 682 (citation omitted). As in *Radtke*, we seemed to understand the but-for test as a tool for measuring whether the discriminatory intent was a sufficient cause of the adverse employment action. Again, we stated, "The ultimate question in an employment discrimination

case is whether the plaintiff was the victim of intentional discrimination." *Hecht*, 499 Mich at 606, citing *Reeves v Sanderson Plumbing Prod, Inc*, 530 US 133, 153; 120 S Ct 2097; 147 L Ed 2d 105 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

Our cases have also indicated that the term "because of" in the ELCRA requires a showing that consideration of the protected characteristic was a motivating factor in the defendant's decision. In *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), we explained that if direct evidence of the prohibited "bias" is produced, the case can proceed as in any other civil matter. "Direct evidence," we said, is " 'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.' " *Id*. (citation omitted). If such evidence is unavailable, then a burden-shifting test applies, under which a rebuttable presumption arises if the plaintiff presents a prima facie case of discrimination: "evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Id*. at 463. This raises a presumption of discrimination which can be rebutted by evidence of a legitimate, nondiscriminatory reason for its decision. *Id*. at 464. If this is shown, then the plaintiff must demonstrate the evidence could lead a reasonable trier of fact to believe that "discrimination was a motivating

factor for the adverse action . . . ." *Id*. at 465 (quotation marks and citation omitted).[6]

The burden-shifting test demonstrates that discriminatory motives are at the heart of the analysis. The test is geared toward determining whether a discriminatory motivation prompted the challenged action. This, in turn, requires deciding whether any nondiscriminatory rationales were mere pretexts. Indeed, in *Hazle*, we went on to say that the "ultimate factual inquiry made by the jury[] [is] whether consideration of a protected characteristic was a motivating factor, namely, whether it *made a difference* in the contested employment decision." *Hazle*, 464 Mich at 466 (emphasis added).

Likewise, in *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134-135; 666 NW2d 186 (2003), we confirmed that discriminatory intent must be shown:

> Under either the direct evidence test or the [burden-shifting] test, a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision. . . . Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision.

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[6] It is generally understood that the but-for test is more rigorous and requires a higher showing than the so-called "motivating factor" standard, in which "a plaintiff [can] prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice. . . . Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision." *Bostock*, 590 US at ___; 140 S Ct at 1739-1740; see also *Hrapkiewicz*, 501 Mich at 1068 (MARKMAN, C.J., dissenting) (stating that the but-for test "imposes a considerably higher causation standard than" the motivating-factor test).

The opinion plainly refers to the central requirement of "discriminatory animus" that must be causally related to the discriminatory act. *Id*.

Consequently, although our Court has used both the motivating-factor and but-for tests, we have always treated the defendant's intent or motivation as the lodestar of the analysis. See *Lytle v Malady*, 456 Mich 1, 33; 566 NW2d 582 (1997) ("The bottom line is that there must always be evidence upon which reasonable minds could conclude that discrimination was the true motive for the decision."), vacated in part on other grounds 458 Mich 153 (1998); *Town v Mich Bell Tel Co*, 455 Mich 688, 704; 568 NW2d 64 (1997) (" '[T]he factual dispute at issue [in a sex-discrimination action] is whether discriminatory animus motivated the employer . . . .' ") (citation omitted). That is, we have always looked to what actually motivated the defendant in taking a discriminatory action. And we have likewise indicated that the statute covers discrimination based on prejudice, bias, animus, or beliefs about a certain characteristic.

Others, including the United States Supreme Court, have endorsed this view in cases addressing similar statutory language.[7] Although the Supreme Court in *Gross*, 557 US at 176, indicated that the phrase "because of" entailed a but-for analysis, it also went on to express its statutory interpretation in the language of the dictionary, stating that "the ordinary meaning of the [Age Discrimination in Employment Act's] requirement that an employer took adverse action 'because of'

[7] Federal precedent "may often be useful as guidance in this Court's interpretation of laws with federal analogues . . . ." *Garg v Macomb Co Comm Mental Health Servs*, 472 Mich 263, 283; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). But "federal precedent remains only as persuasive as the quality of its analysis." *Id*.

age is that age was the 'reason' that the employer decided to act." Elsewhere, the Supreme Court relied on this portion of *Gross* to conclude "that Title VII retaliation claims require proof that the *desire* to retaliate was the but-for cause of the challenged employment action." *Nassar*, 570 US at 352 (emphasis added). In other words, in the context of an anti-retaliation provision of Title VII, the Court focused on the defendant's desire or intent. See generally Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1995), p 160 (noting that in disparate treatment cases, the issue is whether "the defendant's conduct was actuated by some illegitimate motive").

Justice Alito has also taken this approach. See *Texas Dep't of Housing & Community Affairs v Inclusive Communities Project, Inc*, 576 US 519, 560; 135 S Ct 2507; 192 L Ed 2d 514 (2015) (Alito, J., dissenting). "What 'because of' means is no mystery," Justice Alito wrote, pointing to *Gross*'s use of the ordinary dictionary definition. *Id*. "Nor is this understanding of 'because of' an arcane feature of legal usage. When English speakers say that someone did something "because of" a factor, what they mean is that the factor was a reason for what was done." *Id*. "Put another way, 'the terms [after] the "because of" clauses in the [Fair Housing Act (FHA)] supply the prohibited motivations for the intentional acts . . . that the Act makes unlawful.' " *Id*. at 561 (citation omitted). Thus, "[u]nder a statute like the FHA that prohibits actions taken 'because of' protected characteristics, intent makes all the difference." *Id*. at 561-562.

In a similar context, the Supreme Court has further described how discrimination operates with regard to the relationship between intent and a protected char-

acteristic. In *Bray v Alexandria Women's Health Clinic*, 506 US 263; 113 S Ct 753; 122 L Ed 2d 34 (1993), the Court examined 42 USC 1985(3), which prohibits private conspiracies that "depriv[e] . . . any person or class of persons of the equal protection of the laws . . . ." This language, the Court explained, required showing (among other things) "that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action' . . . ." *Bray*, 506 US at 268, quoting *Griffin v Breckenridge*, 403 US 88, 102; 91 S Ct 1790; 29 L Ed 2d 338 (1971). The prohibition centered on " 'invidiously discriminatory motivation . . . .' " *Bray*, 506 US at 268, quoting *Griffin*, 403 US at 102. The question in *Bray* was whether this statute "provide[d] a federal cause of action against persons obstructing access to abortion clinics." *Bray*, 506 US at 266.

The Court first rejected the argument that the relevant "class" was "women seeking abortion," as such a group merely consisted of individuals desiring to engage in certain conduct. *Id*. at 269. The more central argument in favor of finding a cause of action was that efforts to prevent women from accessing abortion clinics amounted to class-based discrimination against "women in general." *Id*. The Court acknowledged that the "animus" requirement was not limited to behavior that constituted "maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women." *Id*. at 270. In other words, the animus (or prejudice or bias) did not have to be malicious, but it did need to be invidious. Moreover, and critically, the motivation had to center on the protected characteristic itself. Discriminatory animus "does demand . . . at least a purpose that focuses upon women *by reason of their sex*—for example (to use an illustration of assertedly benign discrimination), the

purpose of 'saving' women *because they are women* from a combative, aggressive profession such as the practice of law." *Id*.

In *Bray*, there was no record evidence that the defendants had such an intent. *Id*. The Court thus went on to analyze the only other theories under which defendants might still be liable: (1) if opposition to abortion necessarily evinced a sex-based intent, or (2) "intent is irrelevant, and a class-based animus can be determined solely by effect." *Id*. Both theories were wrong. Perhaps, the Court acknowledged, opposition to some activities would be so irrational that it could only be explained by the fact that the activity "happen[s] to be engaged in exclusively or predominantly by a particular class of people . . . ." *Id*. In such circumstances, "an intent to disfavor that class can readily be presumed." *Id*. But opposition to abortion claimed "common and respectable reasons" aside from hatred or condescension toward women as a class. *Id*. With regard to the need for intent, rather than simply effects, the Court noted that " ' "[d]iscriminatory purpose" . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.' " *Id*. at 271-272, quoting *Personnel Administrator of Massachusetts v Feeney*, 442 US 256, 279; 99 S Ct 2282; 60 L Ed 2d 870 (1979). Opposition to abortion, therefore, was not "*ipso facto* sex discrimination." *Bray*, 506 US at 273.

Bray demonstrates that discrimination "because of" a characteristic requires some prejudice, bias, animus, or belief about the protected characteristic. A belief about some other characteristic or conduct—like opposition to a particular sexual orientation—does not suffice. Even if only women engage in some conduct,

opposition to that conduct does not necessarily stem from some belief about the female sex. The mere effect on individuals in a protected status is not enough without discriminatory intent related to that status. This is simply how discrimination works. "Discrimination against persons . . . is necessarily oriented toward them based on their membership in a certain type of social group." Stanford Encyclopedia of Philosophy, *Discrimination* (April 2020), § 1.1 <https://plato.stanford.edu/entries/discrimination/> (accessed July 24, 2022) [https://perma.cc/YK2Q-J3WE]. Put differently, discrimination relates to the protected characteristic rather than some other characteristic or conduct that is sometimes associated with the protected characteristic.

Thus, the ordinary meaning of MCL 37.2302, focusing on the defendant's motivations, captures this commonsense view of discrimination. As two scholars recently wrote of the nearly identical language in Title VII, "The statute proscribes employer conduct based on the reasons that caused or explained the conduct (i.e., based on the employer's motivation), and not on other non-reason-based cases." Berman & Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 Notre Dame L Rev 67, 99 (2021). It is true that, in some contexts, "because of" can mean something other than "motivated by." *Id*. at 100 n 166, citing Zatz, *The Many Meanings of "Because Of": A Comment on* Inclusive Communities Project, 68 Stan L Rev Online 68, 75 (2015) (a brief comment arguing that motivation is not always necessary to the causal concepts embedded in the term "because of"). But the scholars note that the other meanings are motivated by nontextualist purposes, and they contend that "the communicative content of 'because of' in relevantly similar utterances [to that in Title VII]—say, contexts concerning

the wrongfulness or permissibility of acts undertaken by an agent—is most often motivational, making the motivational reading the statute's 'ordinary meaning.' " *Id*.

C. MOTIVE CANNOT BE REMOVED FROM THE ANALYSIS

When motive is removed from the equation, causal statements about discrimination make little sense. An example shows how this is true:

> Suppose Libby intends to dine one evening at Riley's Restaurant. En route to Riley's, Libby, a member of the local Libertarian Party, stops at the Party's office for a short organizational meeting. When arriving at Riley's, Libby is chagrined to learn that the restaurant's last table was taken minutes earlier and that it will be accommodating no more diners that evening. Libby's political affiliation was a but-for cause of Riley's declining to serve Libby: if Libby hadn't been a member of the Libertarian Party, they'd have arrived at Riley's ten minutes earlier, in plenty of time to secure the last table. But Riley's did not decline to serve Libby "because of" Libby's political affiliation: that Libby is a Libertarian was unknown to Riley's or any of its agents and was no part of its decisional calculus. Were Libby to sue Riley's, alleging forbidden political-affiliation discrimination, they'd be laughed out of court (twice over). The example generalizes: a fact or event can be a "but-for cause" of some agent's doing something without it being the case that the agent did that thing "because of" that fact or event. (Here, to repeat, Libby's Libertarianism might have been a but-for cause of Riley's not seating them, without it being the case that Riley didn't seat Libby "because of" Libby's Libertarianism.) To gloss the statutory phrase "because of" X to mean "by reason of" or "on account of" is to affirm this critical point. [Bostock *Was Bogus*, 97 Notre Dame L Rev at 99-100.]

One of the main problems in this example is that Libby's libertarianism is not sufficient to explain the result. That is, the fact that Libby is a Libertarian cannot adequately explain why the restaurant declined to serve her—there are other more immediate factors that fully explain the result, none of which involves any discriminatory motive. No one would say that the restaurant denied Libby public accommodations because of her partisan affiliation. The restaurant does not appear to care about that at all.

In a like manner, defendants who refuse accommodations or employment to someone "because of" that person's sexual orientation do not necessarily care about that person's biological sex. In fact, as in the restaurant example, such defendants need not even know the person's biological sex. See *Bostock*, 590 US at ___; 140 S Ct at 1758 (Alito, J., dissenting) ("Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants."). How can a defendant discriminate against a man *because* he is a man—or a woman *because* she is a woman—without knowing that the target of the discrimination is actually a man? Such a conclusion can be reached only if the threshold requirement for discriminatory motive or intent is thrown out the window. Because otherwise, in these circumstances, the defendants cannot possibly be

acting out of an animus against or any belief about the male (or female) biological sex.

In response to this observation, the majority appears to accept the proposition that sexual orientation is so innately tied to biological sex that one cannot discriminate against the former without also discriminating against the latter. The gist of the contention appears to be that "[i]f a putative non-protected basis for discrimination conceptually depends on the protected characteristics of the plaintiff, then the basis for discrimination is 'because of' the relevant protected category as a matter of ordinary language." Bostock *Was Bogus*, 97 Notre Dame L Rev at 88 (quotation marks and citation omitted). Justice ZAHRA fully reveals the fallacy of this argument.[8] I would add that the argument is also incorrect because, without the

[8] As Justice ZAHRA has also ably demonstrated, no one at the time the ELCRA was passed understood the meaning of the term "sex" to encompass sexual orientation. Further proof of this is that, when the ELCRA was enacted, Michigan had a statute on the books criminalizing sodomy. MCL 750.158. When the ELCRA passed in 1976, SCOTUS had not yet rendered unconstitutional laws that made it a crime for same-sex couples to engage in sodomy. See *Lawrence v Texas*, 539 US 558; 123 S Ct 2472; 156 L Ed 2d 508 (2003). Thus, if defendant is correct here, that would mean that when the ELCRA passed, a reasonable reader would have known that it prohibited discrimination against same-sex couples despite the fact that it was then a crime for those same-sex couples to have sexual relations. That cannot be correct. "When the meaning of a term is questionable, . . . courts should 'construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.' . . . This is 'because it is our role to make sense rather than nonsense out of the *corpus juris*.' " *In re Certified Questions from the US Dist Court, Western Dist of Mich*, 506 Mich 332, 404; 958 NW2d 1 (2020) (VIVIANO, J., concurring in part, dissenting in part), quoting *West Virginia Univ Hosps, Inc v Casey*, 499 US 83, 100-101; 111 S Ct 1138; 113 L Ed 2d 68 (1991), superseded by statute on other grounds. In light of this broader legal context, it is nonsensical to believe that the public understood the ELCRA to protect sexual orientation.

requirement of discriminatory motive regarding a protected characteristic, this mode of analysis is hopelessly reductive. Consider the following example:

> Suppose A shoots B, a police officer, out of anti-police animus. In this case, competent English speakers would agree that "A shot B because B is a police officer." Plausibly if roughly, a police officer is a person whose job is to enforce the law, including by investigating crimes and making arrests. But even if the concept of police officer depends upon and incorporates the concept of a person, competent English speakers would firmly deny that "A shot B because B is a person." [*Id*.]

One cannot be a police officer without being a person, yet no one believes that the shooter targeted the officer because he or she was a person. This is because the shooter had no general animus against people—the animus was against police officers. These are different things, just as an animus against a certain sexual orientation is not the same thing as an animus against a particular sex.[9]

All this shows that without some anchoring in a discriminatory motive that is linked to a protected characteristic, the but-for test fails to place any meaningful limitations on the analysis. But-for causation

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[9] Professor Cass Sunstein also explains it well:

> [I]magine if an English speaker, now or in 1964, says the following: "I am opposed to discrimination because of sex. I am also opposed to discrimination because of sexual orientation." Does the speaker not understand the English language? Is she being redundant? (The answer to both questions is "no.") Or suppose that an English speaker, now or in 1964, says the following: "I am opposed to discrimination because of sex. But I am *not* opposed to discrimination because of sexual orientation." Is the speaker contradicting himself? Is he making some sort of logical error? Does he not understand the language? (The answer to all three questions is "no.") [Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 Cal L Rev Online 463, 475 (2020).]

(also known as counterfactual causation) is transitive, such that it can stretch back to the big bang: "if [event] *e* counterfactually depends on *d* (so *d* causes *e*), and *d* counterfactually depends on *c* (so *c* caused *d*), then *c* causes *e*. This means that the number of causes for any given event *e* is staggeringly large, in each case reaching back to the big bang that apparently began this whole show." Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 San Diego L Rev 1181, 1220 (2003). One might say in all seriousness, "But for the big bang, I would not have spilled this pasta sauce on my shirt." But no one would say that I spilled the sauce "because of" the big bang.[10]

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[10] Despite the fact that this Court has stated that the "ultimate question" in discrimination cases is whether "*intentional* discrimination" has occurred, *Hecht*, 499 Mich at 606 (emphasis added), the majority now declines to decide whether intent has anything to do with an ELCRA claim. The notion that intent could be disregarded in a disparate treatment claim—which is the type of claim at issue in the underlying proceeding—represents a fundamental misunderstanding of discrimination law. As I have discussed at some length, our cases have long held that disparate treatment claims require proof of discriminatory motive or intent. See generally *Forbidden Grounds*, p 160.

There is another theory that permits discrimination claims based on effects alone: disparate impact. These claims "allow courts to infer unlawful discrimination, wholly without evidence of improper motive, and solely from the (perceived) disparate consequences" of the challenged action. *Id*. As one scholar has noted, "the disparate impact theory begins where intentional discrimination ends . . . ." See Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L Rev 701, 706 (2006). Disparate impact "has always been contrasted with racial animus and motive, and despite the familiar refrains regarding how discrimination has become more subtle over time, we continue to define intentional discrimination in the context of animus and consciously impermissible motives." *Id*. Unsurprisingly, this theory is controversial, arguably resting on the assumption either that any disparity in outcome results from discrimination (even if from past practices long discarded) or that the focus on outcomes is necessary to "correct for imbalances that do not result from any unlawful conduct . . . ." *Inclusive Communities Project, Inc*, 576 US at 555 (Thomas, J., dissenting). It is not apparent that we

D. CONCLUSION AND RESPONSIVE ARGUMENTS

Consequently, I believe that, regardless of whether MCL 37.2302 involves a but-for causation test, there is a threshold requirement that the majority ignores: discriminatory motive or intent. The statute applies only if the defendant takes a prohibited action as a result of a prejudice, bias, animus, or belief with regard to the particular protected characteristic. For example, a man is discriminated against "because of" his sex if the defendant acted because of the defendant's bias, prejudice, animus, or belief with regard to men.[11]

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have ever embraced this theory in circumstances like the present. Regardless, the sort of claim at issue here involves disparate treatment, which requires discriminatory intent. Yet the majority has decoupled intent from the statute. In some ways this is more radical, even, than a disparate impact theory, which at least requires what it says—a disparate impact upon a protected class. See *Int'l Brotherhood of Teamsters v United States*, 431 US 324, 336 n 15; 97 S Ct 1843; 52 L Ed 2d 396 (1977) (noting that disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity"). Here, there is no such discernable disparate impact on males as a class or females as a class.

[11] It might be contended that by focusing on a defendant's view of a particular group, this interpretation unduly focuses on a defendant's treatment of groups rather than individuals, whereas the statute protects individuals. The Supreme Court in *Bostock*, 590 US at ___; 140 S Ct at 1740, made such an argument, noting that the statute focused on the defendant's treatment of the individual plaintiff rather than its treatment of a group of which the plaintiff is a member. Thus, according to *Bostock*, it is no defense for an employer who "fires a woman for refusing his sexual advances" that "while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall." *Id*. at ___; 140 S Ct at 1741. This is true, but irrelevant. In the example, the employer made the sexual advances on the employee *because* she was a women and the employer is sexually attracted to women. See Semeraro, *We're All Originalists Now . . . Or Are We?:* Bostock's *Misperceived Quest To Distinguish Title VII's Meaning from the Public's Expectations*, 49 Hofstra L Rev 377, 407 (2021) ("[F]inding a heterosexual man's romantic

My interpretation does not disturb the potential application of the ELCRA to interracial marriage or sex stereotypes. One argument that has been put forward to justify the result reached by the majority is that any other view of the statute would preclude the ELCRA from prohibiting discriminatory actions because of interracial marriage. Amicus American Civil Liberties Union (ACLU) says that an employer would violate the ELCRA by discriminating against employees in interracial marriages because such discrimination would be "because of . . . race." This is true, the ACLU states, even though such a policy applies equally to all races (just as a policy against homosexuals applies to members of both sexes). See also *Bostock*, 590 US at ___; 140 S Ct at 1765 (Alito, J., dissenting) (noting the argument: "So if an employer is happy to employ whites and blacks but will not employ any employee in an interracial relationship, how can it be said that the employer is discriminating against either whites or blacks 'because of such individual's race'? This employer would be applying the same rule to all its employees regardless of their race."). One immediate distinction between the present case and interracial marriage, however, is the historical roots of the latter: "[H]istory tells us," Justice Alito observed, that discrimination on the basis of an interracial relationship "is a core form of race discrimination." *Id*.

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advances unwelcome . . . [is] only [a] problem[] to the employer if the employee is a woman."). "Nor is it a defense," *Bostock* stated, for an employer to say it discriminates against both men and women because of sex." *Bostock*, 590 US at ___; 140 S Ct at 1741. Again, this is true but irrelevant. If the employer is misanthropic and hates women for being women and men for being men—or perhaps is attracted to both men and women and makes sexual advances to both—then his actions are taken on the basis of prejudices or biases about individuals based on their protected traits (shared by groups).

Under my interpretation, the distinction between the two cases goes deeper. The motivation in each situation is different. In the interracial-marriage context, the motivation "has nothing to do with marriage, and everything to do with race: racism and white supremacy. But opposition to same-sex marriage has nothing to do with sexism or male (or female) supremacy." Anderson, *On the Basis of Identity: Redefining "Sex" in Civil Rights Law and Faulty Accounts of "Discrimination"*, 43 Harv J L & Pub Pol'y 387, 416-417 (2020). Any animus against same-sex relationships does not similarly flow to one sex or the other. See *Hively*, 853 F3d at 368 (Sykes, J., dissenting) ("[M]iscegenation laws are inherently racist. They are premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy. Sexual-orientation discrimination, on the other hand, is not inherently *sexist*. No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex."); cf. Anderson, *Disagreement Is Not Always Discrimination: On* Masterpiece Cakeshop *and the Analogy to Interracial Marriage*, 16 Geo J Law & Pub Pol'y 123, 124 (2018) (rejecting the argument that individuals holding the view that marriage should be between one man and one woman are motivated by animus rather than "traditions [that] teach that there is a distinct value in the one-flesh union that only man and woman can form, and in the kinship ties that such union offers children").

In addition, my interpretation would not have any effect on the potential applicability of the ELCRA to

sex stereotypes.[12] The ACLU argues here that discrimination on the basis of sexual orientation amounts to sex stereotyping because it punishes an individual for failing to conform to sex-based expectations about his or her behavior. Justice Alito responded to this very argument in his *Bostock* dissent, noting that perhaps in some cases there are traits associated with homosexuals (that would be tolerated or welcomed in a member of the opposite sex) that lead to discrimination. *Bostock*, 590 US at ___; 140 S Ct at 1764 (Alito, J., dissenting). That is not the case where the discrimination stems directly from sexual orientation itself, rather than from traits associated with that orientation. When defendants discriminate on the basis of sexual orientation, they are not discriminating based on a trait solely related to men or to women. Thus, a policy based on sexual orientation does not have a discernable effect on or aim against one biological sex over the other. Neither sex is being "exposed to" adverse actions "to which members of the other sex are not exposed." *Harris v Forklift Sys, Inc*, 510 US 17, 25; 114 S Ct 367; 126 L Ed 2d 295 (1993) (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

Consider, too, that if the ACLU's argument is correct, it is hard to see how discrimination against heterosexuals would be covered by the statute. The United States Court of Appeals for the Seventh Circuit has stated, "Viewed through the lens of the gender non-conformity line of cases, Hively [the plaintiff]

[12] I do not mean to take any position on whether the ELCRA otherwise covers stereotyping claims—my intent is only to show that such claims would not be precluded by my interpretation of "because of."

represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual." *Hively*, 853 F3d at 346. If *Hively*'s logic is correct, what happens if a homosexual employer fires an employee for being heterosexual and not homosexual? If heterosexuality is a stereotype of men and women, then homosexuality is not—as a result, discrimination against an employee for not being homosexual (i.e., for being heterosexual) would not punish that employee for failing to adhere to sex stereotypes. The ELCRA would therefore protect discrimination "because of" sexual orientation only in favor of homosexuality.

Accordingly, MCL 37.2302(a) does not prohibit discrimination "because of" sexual orientation. Such discrimination is not encompassed by the statute's prohibition of sex discrimination. Applying this interpretation in cases like the present is simple.[13] No one contends that plaintiffs here are motivated by any prejudice, bias, or animus against, or belief about, men qua men or women qua women. They are not accused of misogyny or misandry. Instead, they hold certain views—prejudices, biases, anima, or beliefs—concerning homosexuality. These beliefs—and not any-

[13] To be sure, questions of motivation and belief are not always easily adjudicated. In cases where there is a dual motive, determining which motive predominated can prove challenging. See *Forbidden Grounds*, pp 169-170. Cases like the present, by contrast, generally present a clear picture of motive: an individual was discriminated against because of the defendant's prejudice, bias, or animus related to sexual orientation. There is generally no evidence the defendant had any such beliefs regarding either the male or the female sex.

thing related to a view on biological sex—are at the center of their policies. The statute simply does not extend this far.

II. THE MAJORITY MISAPPLIES THE BUT-FOR TEST

By reading the motive requirement out of the statute, the majority sets itself up for failure in applying the but-for test. This is because the factual scenarios the majority compares under that test lack the fact most critical to plaintiffs' mind in the present case: sexual orientation. Without that fact in the analysis, the majority is able to reach the result it desires. But to do so, the majority must ignore the statutory requirements explained above and, indeed, common sense about what it means to discriminate against a person based on a protected characteristic.

As the Supreme Court has explained, "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 590 US at ___; 140 S Ct at 1739. As one scholar has argued, "counterfactuals by their nature are difficult to prove with any degree of certainty, for they require the fact-finder to speculate what would have happened if the defendant had not done what he did." See Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (New York: Oxford University Press, 2009), p 84.[14] To reduce the

[14] He provides a useful example of this uncertainty:

> Suppose a defendant culpably destroys a life-preserver on a sea-going tug. When a crewman falls overboard and drowns, was a necessary condition of his death the act of the defendant in destroying the life-preserver? If the life-preserver had been there, would [the life have been saved]? . . . .
>
> . . . [There is] an indeterminacy of meaning in the [but-for] test . . . . There is a great vagueness in counterfactual judgments.

uncertainties inherent in the analysis, the hypothetical world must be the one "most similar to ours . . . ." Pearl & Mackenzie, *The Book of Why: The New Science of Cause and Effect* (New York: Basic Books, 2018), p 104 (on the science of causation); Robertson, *Metaphysical Truth vs. Workable Tort Law: Adverse Ambitions?*, 88 Tex L Rev 1053, 1061 (2010) ("Traditional tort law has an accepted answer to [Moore's criticism from *Causation and Responsibility*], one that blunts [Moore's] 'indeterminacy' criticism. The imagined counterfactual world must be the same as the actual world as shown by the evidence in the case in all respects save one: the defendant's wrongful conduct must be corrected to the extent necessary to make the conduct acceptable under plaintiff's theory of the case."). The "imagined correction of the defendant's conduct is the only allowable change, and this change must be done in an intellectually conservative way, employing as little creativity as possible." *Metaphysical Truth*, 88 Tex L Rev at 1061.

On these terms, which the majority appears to adopt, the test is not met here. The core analysis underlying the majority's reasoning comes from an example offered in *Bostock*:

> [I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are

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The vagueness lies in specifying the possible world in which we are to test the counterfactual. When we say "but for the defendant's act of destroying the life-preserver" what world are we imagining? We know we are to eliminate the defendant's act, but what are we to replace it with: a life-preserver that was alternatively destroyed by the heavy seas; a defendant who did not destroy the life-preserver because he had already pushed the victim overboard when no one else was around to throw the life-preserver to the victim; etc, etc? [*Id*. at 84-85.]

> attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. [*Bostock*, 590 US at ___; 140 S Ct at 1741.]

But the but-for test allows changing only one aspect of the real world to create the counterfactual world. And, according to the example, there are only two relevant facts: in the real world the employee is (1) a man, and (2) attracted to men, whereas the comparator (i.e., the counterfactual example) employee is (1) a woman, and (2) attracted to men.

Here is the problem: "This is screamingly false to the facts as stipulated: *to the employer's mind*, the two employees are *not* materially identical in all respects except that one is a man and the other a woman; they are also non-identical in the respect that one is gay and the other straight." Bostock *was Bogus*, 97 Notre Dame L Rev at 106. That fact—the sexual orientation—is dropped out completely from the example despite its being, by all evidence and stipulation, the critical distinction that motivated the employer. In other words, the hypothetical does not "hold[] *everything* constant except the plaintiff's sex" because it also changes the plaintiff's sexual orientation. *Hively*, 853 F3d at 366 (Sykes, J., dissenting) (emphasis altered).

Consequently, in the real world and under the statute (as properly interpreted), there are three relevant facts: "the employee is (1) a man, (2) attracted to men, and (3) gay. The comparator is (1) a woman, (2) attracted to men, and (3) *heterosexual*." Krish-

namurthi, *Not the Standard You're Looking For: But-For Causation in Anti-Discrimination Law*, 108 Va L Rev Online 1, 7 (2022). The majority's but-for analysis changes *two* of these facts, not just one.[15] A woman who is attracted to men is straight. True, she would not get fired. But a woman who is attracted to women is gay, and she presumably would get fired. Each comparator (a straight woman attracted to men or a gay woman attracted to women) has two facts that have been changed. "The majority opinion [in *Bostock*] doesn't provide a principled reason why we should choose one comparator over the other." *Id*. As such, even assuming the statute requires but-for causation, plaintiffs would prevail here, as "sex" is not a but-for cause of a discriminatory action when the defendant is motivated by beliefs concerning sexual orientation.[16]

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[15] Justice Alito in *Bostock* criticized the majority on this point, noting that it tried to frame sex as the only distinction between the employees because both employees are "attracted to men." *Bostock*, 590 US at ___; 140 S Ct at 1762 (Alito, J., dissenting). Justice Alito noted that the employer himself would say the objection is not to sex but sexual orientation. This might seem like a "battle of labels" (i.e., calling the employee homosexual versus saying he is attracted to men), but Justice Alito says that "[s]omething that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label." *Id*.

[16] The majority contends that the third factor is duplicative of the first two factors, as "sexual orientation in this context is simply a helpful shorthand for the combination of sex and sex preference . . . ." The framing matters, however. As discussed, the ELCRA focuses on the defendant's discriminatory intent. From this perspective, *the critical factor* is sexual orientation—which plaintiffs claim motivated their decision in this case. To the extent any factor could drop out as duplicative, it would be the "attracted to men" factor. In that case, the employee would be (a) a man, and (2) homosexual. The comparator would be (a) a woman, and (2) homosexual. Both would be fired and thus the difference in sex would not be a but-for cause. The majority does not explain why its second factor—attraction to men—should be chosen over the "sexual orientation" factor.

Consider another oddity in the majority's analysis, one that does not even require adding a fact to the but-for test: it fails for bisexuals. Put a fired bisexual employee into the framework above: Employee A is (1) a man, and (2) attracted to both men and women. The employer has a policy against bisexuals. Employee A is fired. The comparator is: Employee B is (1) a woman, and (2) attracted to both men and women. Employee B would also be fired. See *Not the Standard*, 108 Va L Rev Online at 11-12. Therefore, sex is not a but-for cause in these circumstances. The majority's test is thus underinclusive to the extent it attempts to prove that discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

If the test does not cover all of what the majority promises, it nonetheless portends to cover a great deal else. Suppose an employer asks about an applicant's race in the application paperwork. The applicant lies, thinking it will give him an advantage. He gets hired and, after some time, admits to the lie. A manager learns of this and fires the employee. "[I]t's intuitively clear that if the employer fires the employee for lying on the hiring paperwork about their race, that isn't and shouldn't be actionable discrimination under Title VII as race discrimination. But that is precisely the conclusion we might draw" from the majority's test. *Id*. at 21. A but-for analysis would proceed as follows: the employee (1) is white, and (2) said he was black on his paperwork. He gets fired for saying he was black. The comparator (1) is black, and (2) said he was black on his paperwork. He does not get fired. *Id*. Thus, race is a but-for cause and the firing is actionable. This cannot possibly be the law.

Consequently, even if some version of the but-for test is the right interpretation of the ELCRA, the majority applies it the wrong way. Plaintiffs' conduct does not satisfy the but-for test.

III. CONCLUSION

The effect of the majority's decision, as Justice ZAHRA explains, is to expand the ELCRA by judicial fiat to cover discrimination "because of" sexual orientation. To do so, the majority has twisted the meaning of the statute by adopting the logic of the but-for test without the need for the defendant to have any discriminatory intent. This does not reflect the ordinary meaning of the statute or the nature of discrimination. Unintentional discrimination would seem to be an oxymoron, but the majority today endorses it. As a result, the majority has misapplied its own test.[17]

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[17] Strangely, in an opinion that adopts the but-for test as controlling for purposes of the ELCRA, the majority claims that "the issue before this Court also does not encompass what the [Michigan Department of Civil Rights (MDCR)] must prove to demonstrate that discrimination on the basis of a protected characteristic was the cause of a denial of a public accommodation . . . ." *Ante* at 410 n 5. Elsewhere in the opinion, however, the majority explains that "the operative phrase 'because of' in the ELCRA establishes a but-for causation standard" and that "[a]ccordingly, we must answer here whether complainants who were denied service because of their sexual orientation would not have been so denied but for their sex." *Ante* at 420. See also *ante* at 421 ("Using this more restrictive definition of the term 'sex' and *applying the but-for causation standard to the provision at hand*, we conclude that discrimination on the basis of sexual orientation necessarily involves discrimination because of sex in violation of the ELCRA.") (emphasis added). No doubt what the majority means to say is that they are not determining whether the particular plaintiff business owners here violated the ELCRA. That may be true, but it is a superficial point based purely on the procedural posture of this case—plaintiffs have brought the action to stop the MDCR's investigation of alleged violations of the ELCRA. On the substance, the majority has clearly decided that if plaintiffs dis-

The results will be significant for Michigan, as the scope of the ELCRA extends far beyond the statute at issue in *Bostock*. The ELCRA, for example, covers all employers, whereas Title VII applies to employers with 15 or more employees.[18] Title VII also contains exemptions for religious organizations, see 42 USC 2000e-1(a), 2000e-2(e); and other federal statutes offer protections for religious liberty that supersede Title VII's requirements, see *Bostock*, 590 US at ___; 140 S Ct at 1754 (discussing the Religious Freedom Restoration Act of 1993, 42 USC 2000bb *et seq*.). It does not appear that there are any such statutory provisions applicable to the ELCRA. In this regard, too, the majority has reached its interpretation today without any concern for whether that interpretation violates constitutional protections of religious liberty. This departs from the

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criminated because of sexual orientation, then they have discriminated because of sex. If this does not demonstrate what must be proved to sustain a claim under the ELCRA, then I am at a complete loss to understand what the majority opinion is about.

The majority indicates that it is instead focused on the "first step in any discrimination analysis under the ELCRA," *ante* at 427 n 17, which requires the plaintiff to establish, among other things, "discrimination based on a protected characteristic" that "result[s] in the denial of the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations . . . of a place of public accommodation," *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). It is unclear what the majority means by the "first step" in the analysis. Since the majority has used the but-for causation test to smuggle sexual orientation into the statute, it is hard to understand the point of the majority opinion if it is not to allow discrimination claims to proceed based on this novel theory. But alas, I will accept the majority opinion at its word that it gives no guidance on what must be proved to establish an ELCRA claim.

[18] Compare MCL 37.2201(a) (" 'Employer' means a person who has 1 or more employees, and includes an agent of that person."), with 42 USC 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .").

normal principle that courts will first consider whether an interpretation raises grave constitutional doubts before adopting that interpretation. See *Sole v Mich Economic Dev Corp*, 509 Mich 406, 419; 983 NW2d 733 (2022). Various amici have raised strong arguments that the majority's interpretation trenches on constitutional liberties. Those concerns should have been considered before the Court reached its interpretation here.[19]

For these reasons, I dissent.

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[19] Plaintiffs have raised religious-liberty arguments that are pending in the Court of Claims and will likely be addressed *after* this opinion.

PEOPLE v GAFKEN

Docket No. 161835. Argued on application for leave to appeal October 13, 2022. Decided December 29, 2022.

Theresa M. Gafken was convicted following a jury trial in the St. Clair Circuit Court of second-degree murder, MCL 750.317. Defendant drove her vehicle at speeds exceeding 100 miles per hour while fleeing the police; she ran a red light and collided with other vehicles, killing one person and severely injuring several others. Defendant was originally charged with one count of second-degree murder and two counts of operating a vehicle while intoxicated (OWI), MCL 257.625(5)(a). Before trial, defendant moved to be allowed to testify that she intended to pull over when the police officer activated his overhead lights and that she did not do so because the passenger sitting behind her, Michael Scandalito, thrust a gun into her ribs and threatened to kill her if she stopped the car. In addition, defendant wanted to testify that Scandalito was on parole and being sought for a parole violation and that he had committed aggravated assault against his mother while using drugs. The prosecution opposed the motion, arguing that defendant should not be allowed to introduce the evidence because it amounted to a duress defense, which was not allowed. The court, Michael L. West, J., granted in part and denied in part the motion, concluding that the evidence was not admissible with regard to the second-degree-murder charge but was admissible with regard to the OWI charges. Following that ruling, the prosecution dismissed the two OWI charges, after which defendant moved to allow a duress defense. The court denied the motion, and the jury ultimately convicted defendant of second-degree murder. Defendant appealed. In an unpublished per curiam opinion issued on June 18, 2020 (Docket No. 345954), the Court of Appeals, MURRAY, C.J., and JANSEN and MARKEY, JJ., affirmed defendant's conviction and sentence. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 508 Mich 961 (2021).

In an opinion by Justice MCCORMACK, joined by Justices BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

A defendant charged with second-degree murder under a depraved-heart theory has a right to raise the affirmative defense of duress. The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. Malice may be established in three ways: by showing (1) the intent to kill, (2) the intent to cause great bodily harm, or (3) the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Murder proved using the third way of showing malice is commonly referred to as depraved-heart murder. A defendant is constitutionally guaranteed the right to a meaningful opportunity to present a complete defense, and duress is a common-law affirmative defense. The defense of duress does not negate any offense element but, rather, excuses the offense. The rationale of the defense of duress is that, for reasons of social policy, it is better that a person, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid a greater evil threatened by another person. Historically, duress was not permitted as an affirmative defense to murder. However, *People v Reichard*, 505 Mich 81 (2020), held that duress may be asserted as an affirmative defense to a charge of felony murder if it is a defense to the underlying felony; the historical rationale that a person should die themselves rather than murder an innocent person does not apply to felony murder because the individual in the felony-murder context faces a choice between whether to spare their own life or aid in a lesser felony (that is, one that does not include as an element the killing of an innocent person). The historical rationale is also absent when depraved-heart murder is charged because depraved-heart murder does not present the choice between sparing one's own life or taking the life of an innocent; rather, the choice presented is to lose one's life or commit a lesser felony than intentional murder. In this case, the prosecution charged defendant only under a depraved-heart theory of murder. Because defendant alleged that she chose to do the lesser evil—drive recklessly—the duress defense was available. The trial court's order preventing defendant from raising a duress defense to a second-degree murder charge that relied on a depraved-heart theory of malice was error, and it was not harmless. The denial of the defense, coupled with the trial court's exclusion of any evidence that Scandalito threatened defendant, effectively left defendant with no defense at all.

Court of Appeals judgment reversed; defendant's conviction vacated; and case remanded to the St. Clair Circuit Court.

Justice WELCH, joined by Justice BERNSTEIN, concurring, agreed with the majority that duress is available as a common-law defense to second-degree murder when the accused is charged and prosecuted under the depraved-heart theory of malice; however, she wrote separately for two reasons. First, Justice WELCH believed it was important to acknowledge that Michigan's Constitution gives the Michigan Supreme Court the final say as to the common law of Michigan regardless of the choices made by other jurisdictions. Recent scholarship has challenged longstanding assumptions about the historical scope of the common-law duress defense in English courts. Moreover, Michigan courts have no obligation to adopt all aspects of English common law. Second, Justice WELCH wrote separately to draw attention to the fact that several questions about the scope and contours of the duress defense as applied to depraved-heart murder were left unresolved by the majority opinion, including who bears the burdens of proof and persuasion. Also left unanswered was whether duress is a complete defense to an unintentional homicide or whether it merely mitigates what would be second-degree murder down to manslaughter. The Michigan Supreme Court will eventually need to provide answers to these questions if the Legislature does not.

Chief Justice CLEMENT, dissenting, would have held that duress is not a defense to depraved-heart murder and that because defendant waived the defense of duress in the trial court, that issue should not have been addressed. Chief Justice CLEMENT disputed whether the choice to act with the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result, as depraved-heart murder requires, was meaningfully different than a choice of taking the life of an innocent person. The common law, as adopted by the Legislature, does not recognize a meaningful distinction between these forms of malice. Keeping all other circumstances the same, a defendant with the intent to kill and a defendant with the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result will be found guilty of the same crime: second-degree murder. That each form of malice results in second-degree murder reflects a moral and legal judgment that the wanton and willful disregard of the risk of death or of great bodily harm is just as depraved as the intent to kill or the intent to cause great bodily harm. The majority incorrectly characterized depraved-heart murder as a "lesser felony" than intent-to-

kill murder because they are the same felony of second-degree murder, only brought under alternative theories of malice. Chief Justice CLEMENT would not have differentiated among the theories of malice regarding the availability of the duress defense as the majority did. Instead, she would have concluded that, just as Michigan common law imposes the moral standard that a threatened person cannot take a life to save their own, the same threatened person cannot act in a way that is nearly certain to cause death or great bodily injury to save their own life.

Justice ZAHRA, joined by Justice VIVIANO, dissenting, emphasized that the long-established principle that duress is not a defense to murder means that no forms of killing with malice can or should be excused on the basis of duress. The majority rested its case on loose language from scattered sources that duress is not a defense to "intentional murder"; these cases at no point mentioned or discussed depraved-heart murder. The majority relied on the lack of more extensive caselaw to support its position, but this lack of caselaw may demonstrate that few serious jurists believed that a defendant could be acquitted of depraved-heart murder because of duress. Regarding *Reichard*, it was incongruous, at best, to apply logic underlying the Court's rejection of felony murder as a common-law crime in toto to create a duress defense for a long-established form of common-law murder—even more so when the primary case cited in favor of that defense explicitly rejected it. All common-law murders are intentional. They all involve an intentional act and either the intent to kill or the legal and moral equivalent to an intent to kill. For centuries, Michigan law has recognized that there is no legal, social, or moral reason to treat differently individuals who kill with the intent to cause death and those individuals who kill with the intentional disregard for human life. The consequences of the majority's decision will be that murder defendants will have a strong incentive to describe their actions in terms of a conscious disregard for death rather than an intent to kill; that difference could decide whether a defendant is found guilty or acquitted, whereas before today's decision the difference between those two forms of intent in a second-degree murder prosecution was largely one of semantics. The majority opinion will likely result in a sea change in the use of duress for homicide prosecutions. Finally, defendant expressly waived the defense of duress in the trial court when she conceded that duress is not a defense to depraved-heart murder; accordingly, defendant relinquished her right to such a defense, and appellate review—let alone reversal —was inappropriate.

Justice VIVIANO, joined by Justice ZAHRA, dissenting, would have held that duress is inapplicable to second-degree depraved-heart murder and that the Court should not have decided this issue at all because defendant waived the issue. The Court made an imprudent mistake when it ordered argument on the duress defense because defendant repeatedly conceded the issue in both lower-court hearings and in several documents, including defendant's briefing in the Court of Appeals and application for leave to appeal in the Supreme Court. The majority's conclusion that the duress defense applies to depraved-heart murder hinged on the premise that the duress defense is inapplicable only to intentional murders and that because depraved-heart murder is not an intentional murder, the duress defense applies; this premise was incorrect and was based on loose dicta that did not reflect any actual holding by any court. Depraved-heart murder is not an intentional homicide in the traditional sense—it is not one in which the defendant actually intends to kill. The majority used this lack of intent to kill—as well as misread the treatises cited in *Reichard* and a few other cases—to distinguish depraved-heart murder from other types of murder for purposes of the duress defense. None of the cases and sources the majority cited for support even discussed or analyzed the matter, let alone decided whether duress applied to unintentional murders. The courts that have addressed this issue disagree with the majority. Furthermore, there was no persuasive rationale for recognizing duress as a defense to unintentional murders. The malice necessary for depraved-heart murder—an implied malice arising from an actor's disregard for the high risk of death posed by the actor's conduct—has long been viewed as equivalent to an express malice consisting of an intent to kill. Malice is a holistic concept that, although it can be classed as express or implied, is not subject to division into different degrees of culpability based on whether the killing was intentional or unintentional. The presence of malice precludes any legal excuse, including duress. Additionally, the inclusion of unintentional killings in the category of murder reflects common moral intuitions and helps explain why depraved-heart murder is distinct from felony murder in respect to the duress defense. Finally, the majority's argument that depraved-heart murder only creates a probability of killing an innocent as opposed to presenting a defendant with a choice to kill or be killed—in other words, that creating the risk of death is less blameworthy than intending to cause death—was flawed; the flaw in this argument was its underlying assumption that depraved-heart murder is materially distinct from intentional murder because the underlying conduct involves only the *risk* of

death, whereas (presumably) the intentional murder presents the *certainty* of death. Even the intentional-murder scenario is unavoidably probabilistic. The rule that duress is inapplicable to attempted murder demonstrates that the defense is inapplicable even when there is the mere risk of death, which is precisely the situation with depraved-heart murder. Under the majority's approach, defendants can invoke the duress defense when their conduct creates a very high risk of death even though they were threatened only with serious bodily harm; defendants thus can choose what seems to be the greater evil and nonetheless invoke the defense.

CRIMINAL LAW — DEPRAVED-HEART MURDER — DEFENSES — DURESS.

The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse; malice may be established in three ways: by showing (1) the intent to kill, (2) the intent to cause great bodily harm, or (3) the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm; murder proved using the third way of showing malice is commonly referred to as depraved-heart murder; a defendant charged with second-degree murder under a depraved-heart theory has a right to raise the affirmative defense of duress.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Melissa J. Keyes*, Senior Assistant Prosecuting Attorney, for the people.

Bush Seyferth PLLC (by *Derek J. Linkous* and *Jeffrey A. Turner*) for defendant.

Amicus Curiae:

Douglas Lloyd, *Kym L. Worthy*, *Jon P. Wojtala*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

MCCORMACK, J. Two terms ago, in *People v Reichard*, 505 Mich 81; 949 NW2d 64 (2020), this Court unanimously held that duress may be asserted as an affir-

mative defense to felony murder if it is a defense to the underlying felony. This case asks whether *Reichard*'s rationale extends to allowing duress to be asserted as an affirmative defense to what is known as depraved-heart second-degree murder. It does. We also conclude that the error in denying the defense was not harmless, so we reverse the judgment of the Court of Appeals and remand this case to the St. Clair Circuit Court for further proceedings.[1]

I. FACTS AND PROCEDURAL HISTORY

In April 2018, while fleeing from police, Theresa Gafken ran a red light at speeds topping 100 miles per hour and collided with other vehicles, killing one person and causing severe injuries to several others; Gafken was also injured. The prosecution charged her with second-degree murder, MCL 750.317, and two counts of operating a vehicle while intoxicated (OWI) causing serious impairment of a body function, MCL 257.625(5)(a). Before trial, Gafken moved to allow certain testimony. Specifically, she asked to be allowed to testify that she intended to pull over when the police officer activated his overheard lights and that she didn't do so because Michael Scandalito, who was sitting behind her, then thrust a gun into her ribs and threatened to kill her if she stopped the car. She also wanted to testify that Scandalito was on parole and being sought for a parole-violation warrant and had committed aggravated assault against his mother while in a methamphetamine rage. The prosecution opposed the motion, arguing that Gafken could not

[1] In light of our holding, we decline to address the defendant's argument about the jury instruction on malice, Issue 2 in our order granting oral argument on the application. See *People v Gafken*, 508 Mich 961, 962 (2021).

assert a duress defense to murder and should not be allowed to introduce this evidence.

The trial court granted in part and denied in part the motion. The court held that the evidence was not admissible on the homicide count but was admissible on the counts of OWI causing serious impairment of a body function. The prosecution then dismissed the two counts of OWI causing serious impairment of a body function.

Gafken then moved to allow a duress defense. Following arguments, the trial court denied her motion.

The jury convicted Gafken of second-degree murder. The Court of Appeals affirmed her conviction and sentence in an unpublished opinion. *People v Gafken*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2020 (Docket No. 345954). After directing the prosecutor to respond to Gafken's application, *People v Gafken*, 955 NW2d 900 (2021), we ordered oral argument on the application and asked the parties to file supplemental briefs addressing these issues:

> (1) whether the trial court erred in excluding evidence that the defendant was threatened and of the defendant's mental state at the time of the offense; (2) whether the trial court erred in its instruction to the jury as to the intent element of second-degree murder; and (3) whether any error was harmless. [*People v Gafken*, 508 Mich 961, 962 (2021).]

II. ANALYSIS

Whether a common-law affirmative defense is available for a statutory crime is a question of law that we review de novo. *Reichard*, 505 Mich at 85. This means that we review the issue independently, without defer-

ence to the lower court. *People v Jemison*, 505 Mich 352, 360; 952 NW2d 394 (2020).

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice may be established in three ways: by showing (1) the intent to kill, (2) the intent to cause great bodily harm, or (3) the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id*. at 464. Or, we also have held that the third theory for proving malice can be shown by "the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984). The prosecution charged Gafken only under the third theory of malice, commonly referred to as depraved-heart murder. See, e.g., *People v Aaron*, 409 Mich 672, 714; 299 NW2d 304 (1980).

"Duress is a common-law affirmative defense." *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). It does not negate any offense element but, rather, excuses the offense. *Id*. at 246 n 15. " 'The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person.' " *Id*., quoting 1 LaFave & Scott, Substantive Criminal Law, § 5.3, pp 614-615.

In *Reichard*, we explained that "[h]istorically, duress was not permitted as an affirmative defense to murder." *Reichard*, 505 Mich at 88. Quoting Lord Matthew Hale and William Blackstone, we identified why:

" '[T]hough a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.' " *Id*. at 92, quoting 4 Blackstone, Commentaries on the Laws of England, p *30, and citing 1 Hale, History of the Pleas of the Crown, p 51. But that rationale did not apply to felony murder because "felony murder does not present that choice. Instead, in the felony-murder context, the individual faces a choice between whether to spare his or her own life or aid in a lesser felony (i.e., one that does not include as an element the killing of an innocent)." *Reichard*, 505 Mich at 92.

The rationale for the no-duress-defense-for-murder rule is just as absent when depraved-heart murder is charged. Depraved-heart murder does not present the choice between sparing one's own life or taking the life of an innocent. It is not kill or be killed. Rather, the choice presented here is like the choice in *Reichard*: lose one's life or commit a lesser felony than intentional murder (here, reckless driving and fleeing from law enforcement).

Although it has often been repeated that duress is not a defense to "homicide" or "murder," *Reichard*, 505 Mich at 89 n 18, we have recognized that this is an overly broad statement of the rule, *id*. at 90 n 18. Instead, the no-duress-defense-for-murder rule has been limited to cases of *intentional* murder historically. See, e.g., 2 LaFave, Substantive Criminal Law (3d ed), Duress, § 9.7(b), p 100 ("[D]uress is no defense to the intentional taking of life by the threatened person . . . ."); *Cole v State*, 221 So 3d 534, 543 n 4 (Fla, 2017) (stating that " 'duress is not a defense to intentional homicide' "), quoting *Henry v State*, 613 So 2d

429, 432 n 6 (Fla, 1992); *Commonwealth v Vasquez*, 462 Mass 827, 835; 971 NE2d 783 (2012) ("The common law has steadfastly rejected duress as a defense to intentional murder."); *Tully v State*, 730 P2d 1206, 1210; 1986 OK CR 185 (Okla Crim App, 1986) (noting that "common law recognized early on that duress should have no application to the *intentional* taking of an innocent life by the threatened person").

To be sure, some authority from other jurisdictions sounds in a broad rule—that duress is not a defense to "murder" without qualification. See, e.g., *People v Anderson*, 28 Cal 4th 767, 780; 50 P3d 368 (2002) ("duress is not a defense to any form of murder"); 40 Am Jur 2d, Homicide § 107, p 721 (it is "generally held" that duress is not a defense to murder and that "duress [does not] mitigate murder to manslaughter"). But generally, this authority involves interpretation of a statute providing under what terms a duress defense can be raised. *Anderson*, 28 Cal 4th at 773 (interpreting Cal Penal Code 26). Of course, a state legislature may dictate the terms in which the duress defense may be raised. Because our Legislature has not done so, we apply the common-law rule.

And we are aware of no court that has considered the issue of whether duress can be raised as a defense to an unintentional homicide. Where courts have examined related questions (although in dictum), they have recognized that duress is at least *relevant* when the killing under duress isn't intentional. See *Anderson*, 28 Cal 4th at 779-780 ("Although duress is not an affirmative defense to murder, the circumstances of duress would certainly be relevant to whether the evidence establishes the elements of implied malice murder."); *id*. at 795 (Kennard, J., concurring in part and dissenting in part) ("The majority's discussion

appears to assume that murder necessarily involves a *choice* to take an innocent life. Second degree murder, however, does not require an intent to kill."). Indeed, the concurrence/dissent in *Anderson* set forth a hypothetical with similar facts to those alleged by Gafken here:

> Imagine, for example, this scenario: Two armed robbers fleeing the scene of a store robbery force their way into a car that is leaving the parking lot. One robber holds a gun to the driver's head, while the other places a gun against the head of the driver's wife. They order the driver to take off at high speed and not to stop or slow down for stop signs or signal lights, threatening immediate death to the driver and his wife. If the driver complies, and an accident ensues resulting in the death of an innocent person, the driver could be prosecuted for second degree murder on an implied malice theory, and, under the majority's construction of section 26, the driver could not assert duress as a defense. I doubt that our Legislature intended to withhold the defense of duress under these or similar circumstances. [*Id*.]

Understanding the foundation of the no-duress-defense-for-murder rule, we believe that Hale and Blackstone would not have intended to withhold the duress defense on these facts. Because Gafken alleges that she chose to do the lesser evil, a duress defense is available. See *Lemons*, 454 Mich at 246.

The prosecution doesn't offer many arguments to the contrary. Instead, it argues that this Court should not allow a duress defense for depraved-heart murder because the facts will make it very difficult for Gafken to succeed under a duress defense. But that argument confuses whether the law permits a duress defense (our job) with whether the defendant will be able to

prevail on such a defense before a jury (not our job). A jury may agree with the prosecution—Gafken has a right to find out.[2]

A defendant is constitutionally guaranteed the right to a "meaningful opportunity to present a complete defense." *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (2012) (quotation marks and citation omitted). The trial court's order preventing Gafken from raising a duress defense to a second-degree murder charge that relied on a depraved-heart theory of malice was error, and it was not harmless. The denial of the defense, coupled with the trial court's exclusion of any evidence that Scandalito threatened Gafken, effectively left Gafken with no defense at all. The jury heard Gafken concede that she engaged in the conduct leading to the victim's death but was never able to consider whether "the law excused [her] conduct . . . ." *People v Leffew*, 508 Mich 625, 656; 975 NW2d 896 (2022). Because the prosecution has not shown that this preserved constitutional error was harmless beyond a reasonable doubt, we reverse. *People v Sammons*, 505 Mich 31, 56; 949 NW2d 36 (2020).

III. CONCLUSION

A defendant charged with second-degree murder under a depraved-heart theory has a right to raise the affirmative defense of duress. The defendant in this case was denied her right to do so, and the error was

[2] If we extend the duress defense to depraved-heart murder, as we have, the prosecution and amicus Prosecuting Attorneys Association of Michigan encourage us to place the burden of persuasion on Gafken to establish the defense by a preponderance of the evidence. We decline to address the burden issue because it was not included in our order granting oral argument on the application.

not harmless. We therefore reverse the Court of Appeals judgment, vacate Gafken's conviction, and remand to the St. Clair Circuit Court for further proceedings consistent with this opinion.

BERNSTEIN, CAVANAGH, and WELCH, JJ., concurred with MCCORMACK, J.

WELCH, J. (*concurring*). I agree with the majority that duress is available as a common law defense to second-degree murder when the accused is charged and prosecuted under the depraved heart theory of malice. I write separately for two reasons. First, I believe it is important to acknowledge that Michigan's Constitution gives this Court the final say as to the *common law of Michigan*, now and into the future, regardless of the choices made by other jurisdictions. Moreover, recent scholarship challenges longstanding assumptions about the historical scope of the common law duress defense in English courts. Secondly, although I agree with the decision to recognize duress as a common law defense to *unintentional* second-degree murder, the Court has left unresolved several questions about the scope and contours of the defense. Whether a successful duress defense excuses all criminal liability for an *unintentional* killing (such as depraved heart murder) is an open question. In short, courts will continue to grapple with the obvious tension between the death of an innocent bystander and allegations that the actions causing the death were the result of duress. And, of course, the Legislature can address the scope of the duress defense if it so chooses.

I. COMMON LAW DURESS HAS A COMPLICATED HISTORY THAT DOES NOT BIND THIS COURT

This Court has the constitutional authority and prerogative to provide the final say on what the common law is in *Michigan*. See *Placek v Sterling Hts*, 405 Mich 638, 656; 275 NW2d 511 (1979) ("There is no question that both this Court and the Legislature have the constitutional power to change the common law.").[1] This Court has also recognized that "in exercising our common-law authority, our role is not simply to 'count heads' but to determine which common-law rules best serve the interests of Michigan citizens." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 607; 614 NW2d 88 (2000). It is also well established that Michigan courts do not have an obligation to adopt all aspects of English common law. See *Perrin v Lepper*, 34 Mich 292, 295 (1876) (" 'The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.'—*Story, J.,* in *Van Ness v. Pacard*, *2 Pet., 144*[.]"). Today's decision also is not the first time that this Court has changed the course of Michigan common law in a significant way. See, e.g., *Placek*, 405 Mich at 650 ("We hold, in the interest of

[1] See also Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."); Const 1963, art 6, § 1 ("[T]he judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, [and] one trial court of general jurisdiction . . . ."). This Court has interpreted Const 1963, art 3, § 7 as authorizing "both judicial change and legislative amendment or repeal." *Placek*, 405 Mich at 657, citing *Myers v Genesee Co Auditor*, 375 Mich 1, 7; 133 NW2d 190 (1965).

justice for all litigants in this state, that the doctrine of comparative negligence hereby replaces the doctrine of contributory negligence and that the standards of comparative negligence are to be applied by the court on remand for new trial in the instant case and on a limited retroactive basis.").[2]

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[2] I do not read the dissents as contesting this Court's authority to define or change Michigan's common law. Rather, the dissents appear to be better understood as objecting to the new common law path on which the majority has chosen to embark and as raising concerns about the depth of the majority's analysis. Further, I disagree with the dissents' assertion that the duress-defense issue was waived by defendant, Theresa M. Gafken. Justice VIVIANO argues that defendant waived the duress defense in the Court of Appeals. Justice ZAHRA argues that defendant waived the duress defense in the trial court. Defendant filed numerous pretrial motions concerning these issues. To the extent Justice VIVIANO argues that this issue was waived or abandoned in the Court of Appeals, defendant's appellate attorney argued the following in the brief filed with the Court of Appeals: "In the present case, the precluded evidence was not a means of claiming that Ms. Gafken was innocent of homicide. That would clearly be prohibited by law. The only issue at trial was whether Gafken was guilty of second-degree murder or involuntary manslaughter." (Emphasis omitted.) Appellate counsel's focus on duress to negate malice and the concession that allowing a common law duress defense to homicide was prohibited by then-existing precedent may have been a tactical decision given the state of the law. But it would be an unjust mistake for this Court to read appellate counsel's argument as waiving defendant's ability to present defendant's previously raised argument that the common law duress defense to depraved heart murder *should* be permitted. As the majority acknowledges, a defendant is entitled to a " 'meaningful opportunity to present a complete defense.' " Quoting *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (2012). This Court has also repeatedly recognized that even when an issue is not preserved, "this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice[.]" *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Given this Court's conclusion that the common law duress defense is permitted when defending against allegations of depraved heart murder, it would be unjust for this Court to ignore defendant's preserved issue merely because of a few sentences of her appellate attorney's argument in the Court of Appeals. Because the trial court did not permit defendant to present a duress defense to

Asking whether duress can serve as a defense to homicide is a deceptively complex question. Historically, many American common law courts have held that duress is not a defense to homicide, at least when the killing was intentional. See, e.g., *State v Nargashian*, 26 RI 299, 301-304; 58 A 953 (1904) (holding that the trial court properly rejected a duress jury instruction for an accomplice to an intentional killing). This Court has previously recognized the historical basis for this American jurisprudential view to be grounded, at least in part, in ancient treatises authored by Sir Matthew Hale and Sir William Blackstone. See *People v Reichard*, 505 Mich 81, 88-89; 949 NW2d 64 (2020). Some jurists who have looked at these legal texts have assumed or argued that, at least from a historical perspective, duress cannot be a defense to any killing committed with malice.

In his dissent, Justice VIVIANO argues that there is not historical support for the path the Court has taken today. For example, the dissent cites 1 Hale, History of the Pleas of the Crown, p 51, and argues that

> [s]ome of the older sources note that duress was also inapplicable to other crimes not involving killing at all, including treason and robbery. From this, it would appear that the more prevalent and longer-established version of the rule is the broader one [i.e., that duress is unavailable as a defense to all homicides]. [*Post* at 558-559.]

This might be a fairer critique if it was unquestionably true. But history—and the law—can be shaped by one idea or viewpoint while ignoring others that existed at the time. Many legal scholars writing on the subject of duress as a defense focused their attention on the development of criminal law *after* Hale and Blackstone

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the jury, it would be inappropriate for this Court to opine on whether defendant can successfully assert the defense on remand.

penned their seminal treatises. Hale and Blackstone have been bestowed with a sage-like quality in American jurisprudence as irrefutable sources of authority regarding English common law. Judges, advocates, and scholars have been hesitant to question the premise of the legal assertions penned by these jurists centuries ago. But recent scholarship raises questions about many of these historical common law assumptions. See Elkington, *The Historical Development of Duress and the Unfounded Result of Denying Duress as a Defence to Murder* (Online First publication), J Crim L (2022), available at <https://journals.sagepub.com/doi/10.1177/00220183221093993> [click "PDF / ePub"] (accessed December 5, 2022). Elkington examined "all reported duress cases and the Statutes of the Realm, which significantly impacted on the development of the law, from 1266 (the first found recorded use of duress) until the end of the 19th century with the landmark case of *Dudley and Stephens*." *Id*. at 2 (citation omitted). She argues that at its conception, "duress was created as a full defence for treason, including where the defendant had killed," and concludes that "the decision to deny use of the [duress] defence in [*R v Howe*, (1987) AC 417 (appeal taken from Court of Appeal, Criminal Division)] cannot be substantiated by reference to the defence's historical development." *Id*. For example, Elkington notes the following:

> Many of the initial cases where duress was used were where the defendant had been involved in some form of civil war or rebellion. In Henry III Statutes of the Realm 1266–67 the excuse of duress was used to mitigate the punishments of those who had committed treason by assisting rebels in the battle of Evesham. The ordinary punishment for bailiffs and officers of the Earl of Leicester who had committed treason through actions amounting to robbery and manslaughter, was a fine of as much as their

> lands were worth for five years, but the punishment for those who acted through fear had the lesser punishment of one year's value of their land. This early reference to duress sets no limits on what type of offence duress would act to mitigate, although it is an early indication that acting under duress could be used to mitigate the punishment for manslaughter in treason cases. [*Id*. at 3 (citations omitted).]

These observations are directly contrary to the assertion that there is little historical basis for duress serving as a defense to crimes of treason or homicide.

Elkington further noted that peacetime English courts eventually rejected duress as a defense to murder in 1838 in the case of *R v Tyler*,[3] *id*. at 7, but she questions the historical and doctrinal basis for this change in course considering prior precedent, *id*. Of course, Elkington's work, standing alone, is unlikely to resolve hundreds of years of debate among legal scholars.[4] But her research suggests that at least some of the assumptions made by American courts about English common law are premised on an inaccurate—or at least incomplete—account of the historical record. Perhaps Hale and Blackstone did not have all the relevant information or perhaps they chose one historical narrative given the preferred public opinion, moral narrative, or political climate of the times. Elkington observes that by the time Hale was writing in the

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[3] *R v Tyler*, 173 Eng Rep 643; 8 C & P 616 (1838).

[4] Elkington is not the first scholar to question or analyze the pragmatic and philosophical bases for prohibiting duress as a defense to murder. See, e.g., Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 San Diego L Rev 159, 173-180 (2006) (advocating for a more flexible approach to the duress defense); Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 Cal L Rev 1331, 1368-1375 (1989) (discussing line-drawing considerations for duress and the idea of coerced homicides).

eighteenth century, he "made the point that the law is different in times of war to times of peace; stating that duress would not be a defence to treason, murder[,] or robbery in times of peace, but could be (a defence to treason) in times of war or rebellion." *Id*. at 5-6. She notes, however, that such an argument "seems . . . illogical if the threat was immediate and so no protection could be sought even in times of peace[.]" *Id*. at 6. It is entirely possible that rather than simply documenting verbatim previous legal determinations, Hale and Blackstone were doing what many advocates and legal scholars do today: making subtle arguments for what they thought the common law *should* be. And while learned legal scholars and their treatises provide beneficial context and background, the words of Hale and Blackstone do not dictate Michigan's common law today.

II. THE COURT'S DECISION TODAY LEAVES MANY QUESTIONS UNANSWERED

The Court's decision today recognizes the existence of a duress defense for *unintentional* second-degree murder. Many questions remain. Some the Court has expressly declined to reach today, such as who bears the burdens of proof and persuasion as to the duress defense. Other questions also remain unanswered. One particularly thorny question is whether duress is a complete defense to an *unintentional* homicide, or whether it merely mitigates what would be second-degree murder down to manslaughter. This question warrants some illumination.

A. STATE LAW STATUTORY AND COMMON LAW REGARDING THE DURESS DEFENSE IS NOT UNIFORM ACROSS THE COUNTRY

There is a lack of consensus among state jurisdictions as to whether and to what extent duress can excuse a homicide. Section 2.09 of the Model Penal Code provides that duress is a complete affirmative defense to *any crime* unless the "actor recklessly placed himself in a situation in which it was probable that he would be subject to duress" or if the actor does so negligently if negligence would be enough to "establish culpability for the offense charged." Model Penal Code, § 2.09(2) (1985). But model codes are not the law unless adopted, usually through the legislative process.

In terms of legislation, as the majority and dissenting opinions acknowledge, states have taken a variety of approaches toward the duress defense. Twelve states have enacted statutes that appear to mirror, if not explicitly adopt, § 2.09 of the Model Penal Code, including its carveout.[5] Nine additional states have adopted statutes that appear to allow duress as a complete or partial defense to one or more forms of nonintentional homicide.[6] Ten other states have en-

[5] See Alaska Stat 11.81.440; Ark Code Ann 5-2-208; Conn Gen Stat 53a-14; Del Code Ann tit 11, § 431; Haw Rev Stat 702-231; NY Penal Law 40.00; ND Cent Code 12.1-05-10; 18 Pa Cons Stat 309; SD Codified Laws 22-5-1; Tenn Code Ann 39-11-504; Tex Penal Code Ann 8.05; Utah Code Ann 76-2-302.

[6] See Colo Rev Stat 18-1-708 (making duress available for all offenses other than "class 1" felonies, which includes some but not all forms of homicide); Idaho Code 18-201 (making the duress defense available for all offenses that are not "punishable with death"); Ky Rev Stat Ann 501.090 (allowing duress as a defense to all crimes except "intentional homicide"); Me Stat, tit 17-A, § 103-A (excluding homicides that are committed "intentionally or knowingly" from the duress defense); Minn Stat 609.08 and Minn Stat 609.20(3) (providing that a successful duress defense mitigates an intentional or unintentional killing to manslaugh-

acted statutes that appear to foreclose the duress defense for all intentional or reckless killings, if not for all forms of homicide.[7] Concerning the latter two groups, nearly all state legislatures have adopted the carveout provision from the Model Penal Code that precludes the defense if the actors intentionally or recklessly put themselves in a position to be placed under duress. Declaring that someone *could potentially* be excused, in full or in part, for causing the death of another person to save their own life is an unenviable quagmire on many levels. The lack of

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ter in the first degree); Mont Code Ann 45-2-212 (making duress available as a defense to all crimes except those punishable by death, such as deliberate homicide under Mont Code Ann 45-5-102); NJ Stat Ann 2C:2-9(b) ("In a prosecution for murder, the [duress] defense is only available to reduce the degree of the crime to manslaughter."); Nev Rev Stat 194.010(8) (making duress available as a defense to all crimes except those punishable by death, such as first-degree murder); Wis Stat 939.46 (allowing a duress defense to most crimes, but "if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide").

[7] See Ala Code 13A-3-30(d) (excluding all forms of murder and killings under aggravated circumstances from the duress defense); Ariz Rev Stat Ann 13-412 (defining duress as a justification defense, but excluding "offenses involving homicide or serious physical injury"); Ga Code Ann 16-3-26 (making duress available as a defense for all crimes except "murder"); Ind Code 35-41-3-8 (excluding from duress defense crimes "against the person as defined in" Ind Code 35-42, which includes all forms of homicide, battery, kidnapping, human trafficking, sex crimes, and robbery); Iowa Code 704-10 (allowing a duress defense for all crimes except "an act by which one intentionally or recklessly causes physical injury to another"); Kan Stat Ann 21-5206 (allowing a duress defense for all crimes except murder or voluntary manslaughter); La Stat Ann 14:18 (defining duress as a justification defense but excluding "murder"); Mo Rev Stat 562.071 (making duress available for all crimes except "murder"); Or Rev Stat 161.270 (making duress available for all offenses other than "murder"); Wash Rev Code 9A.16.060(2) (making duress available as a defense for all crimes except "murder, manslaughter, or homicide by abuse").

uniformity among states that have taken legislative action illustrates that such line-drawing is fraught with difficulty.

In common law jurisdictions, the law is equally unsettled. No court appears to have resolved the precise question that was presented to this Court—whether the common law duress defense is available to refute allegations of unintentional homicide premised on a criminal recklessness theory of malice (also known as depraved heart murder in Michigan). With respect to the courts that have addressed duress in the context of homicide accusations, nearly every case involved an intentional killing, and to the extent that unintentional killings have been discussed, it has generally been in dicta.[8] For example, in *People v*

[8] See, e.g., *Driggers v State*, 917 So 2d 329, 331 (Fla App, 2005) (in an appeal by the defendant who was charged with intentional second-degree murder but was convicted of voluntary manslaughter as a lesser included offense, the trial court observed that "[t]he courts generally agree that duress is not a defense to homicide"); *People v Serrano*, 286 Ill App 3d 485, 491; 676 NE2d 1011 (1997) (in an appeal arising from convictions of felony murder, the court noted that duress may be raised as a defense to felony murder but not to other forms of homicide); *Commonwealth v Vasquez*, 462 Mass 827, 835; 971 NE2d 783 (2012) (in an appeal from convictions of intentional first-degree murder, the court held, "we hereby reject duress as a defense to deliberately premeditated murder, murder committed with extreme atrocity or cruelty, and murder in the second degree"); *Johnson v State*, 290 So 3d 1232, 1242 (Miss, 2020) (in an appeal from a conviction of first-degree murder under an accomplice-liability theory, the court noted that "[l]ongstanding Mississippi law holds that duress is not a legal defense to murder") (quotation marks and citation omitted; alteration in original); *Long v State*, 74 P3d 105, 108; 2003 OK CR 14 (Okla Crim App, 2003) (in an appeal from a conviction of first-degree intentional murder, the court noted that "duress is not a defense to the intentional taking of an innocent life by a threatened person"); *State v Smarr*, 146 NC App 44, 54; 551 SE2d 881 (2001) (in an appeal from a conviction for intentional second-degree murder, the court noted that duress is not applicable to murder); *State v Finnell*, 101 NM 732, 737; 688 P2d 769 (1984) (in an appeal from a

Anderson, 28 Cal 4th 767, 780; 50 P3d 368 (2002), the California Supreme Court held that Cal Penal Code 26 did not create a statutory right to a duress defense and that at common law, "duress is not a defense to any form of murder." The court also rejected arguments that duress could reduce murder to manslaughter. However, *Anderson*, *id*. at 784, acknowledged, and the court reaffirmed in *People v Powell*, 6 Cal 5th 136, 164; 425 P3d 1006 (2018), that duress may be raised as a defense to felony murder if it is a defense to the underlying felony. Notably, *Anderson* was not a case concerning allegations of an unintentional homicide. Rather the homicide allegations in that case arose from a brutal group beating that eventually led to the victim being bludgeoned to death and disposed of in a ravine. *Anderson*, 28 Cal 4th at 770-771. Thus, any commen-

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conviction for first-degree intentional murder, the court noted that duress is not a defense to homicide); *State v Fuller*, 203 Neb 233, 243; 278 NW2d 756 (1979) (in an appeal from a conviction of first-degree intentional murder, the court noted that "[d]uress or compulsion is no excuse to a charge of homicide"), rev'd in part on other grounds; rehearing denied, 204 Neb 196 (1979); *State v Nargashian*, 26 RI 299, 304; 58 A 953 (1904) (in an appeal from a conviction of intentional murder as an accomplice, the court held that "fear induced by one person is no defense to a defendant who kills another under its influence"); *Arnold v Commonwealth*, 37 Va App 781, 788; 560 SE2d 915 (2002) (in an appeal from a conviction of second-degree murder, the court acknowledged that duress is a defense to felony murder when the murder is committed by a co-actor but suggested that it is not available for other forms of murder); *State v Rocheville*, 310 SC 20, 26; 425 SE2d 32 (1993) (in an appeal from convictions of armed robbery, kidnapping, and murder, the court noted that duress is not a complete defense to intentional murder and that it also cannot mitigate the crime to voluntary manslaughter); *James v State*, 357 P3d 101, 106; 2015 WY 83 (2015) (in an appeal from a conviction for aiding and abetting a robbery, the court noted that "[i]n Wyoming, duress has been recognized as a defense to criminal charges, other than a charge of taking the life of an innocent person").

tary in *Anderson* concerning the nonapplicability of the common law duress defense to an unintentional homicide was dicta.

B. THE POSSIBILITY OF AN IMPERFECT DEFENSE

The majority opinion today does not answer the question of whether duress is a *complete* defense to allegations of *unintentional* second-degree murder. Some state legislatures have recognized duress as a mitigating defense. See NJ Stat Ann 2C:2-9(b) ("In a prosecution for murder, the [duress] defense is only available to reduce the degree of the crime to manslaughter."). The possibility of an imperfect or mitigating defense to homicide has also been discussed by leading scholars:

> One who is coerced by another person, or forced by the pressure of natural physical circumstances (e.g., thirst, starvation) into committing what is otherwise a crime, may have in some circumstances a complete defense to the crime, but not if the crime in question consists of intentionally killing another human being. Thus one who, not in self-defense or defense of another, kills an innocent third person to save himself or to save another is guilty of a crime. But it is arguable that his crime should be manslaughter rather than murder, on the theory that the pressure upon him, although not enough to justify his act, should serve at least to mitigate it to something less than murder. Some of the latest state criminal codes so provide. [2 LaFave, Substantive Criminal Law (3d ed, 2018), § 15.3(c), p 705 (citations omitted).]

The Court of Special Appeals of Maryland followed the mitigation path outlined by LaFave in *Wentworth v State*, 29 Md App 110, 118; 349 A2d 421 (1975). Wentworth was charged with second-degree murder as an accomplice to an intentional murder committed by her husband. The issue the court considered was

whether the defendant's charges could be reduced to voluntary manslaughter in light of strong evidence that the defendant had little choice or ability to escape from her husband during or after the killing. *Id*. at 112-113, 116. The *Wentworth* court recognized that "[w]hatever the psychological reality may be, the law, as a matter of social policy, has declared that the defense of duress may not extend to the taking of an innocent person's life." *Id*. at 118. Despite this, the court found compelling LaFave's & Scott's treatise (albeit an older edition) and other authorities, and it held that "an 'imperfect' defense of duress may not exculpate a defendant in an unlawful homicide case but may supply that mitigation necessary to lower the degree of guilt from murder to manslaughter[.]" *Id*. at 121. Similar logic might be applicable to depraved heart murder given that a death was not intentional but was a natural and probable consequence of the accused's reckless conduct.

Similarly, in the felony-murder context, this Court's decision in *Reichard* did not recognize duress as a complete defense to the killing. *Reichard*, 505 Mich at 88-89. Rather, the Court held that the prosecution could "proceed against the defendant on the lesser included offense of second-degree murder if the evidence supported that charge. In other words, the defendant's duress defense to the underlying felony would only prevent the enhancement of second-degree murder to first-degree murder." *Id*. at 95-96 (citation omitted). Under *Reichard*, a successful duress defense to accusations of felony murder does not excuse the accused from the risk of punishment for the crime if the conduct could be prosecuted as second-degree murder. Stated differently, a prosecution could move forward if there is evidence that a human death occurred, because of the actions of the accused (or an accom-

plice), with malice, and without a proper justification or excuse. See *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).

It is also worth noting that voluntary manslaughter in Michigan operates similarly to an imperfect defense. All the elements of intentional second-degree murder are present: (1) a death, (2) caused by the defendant's act, (3) with malice (under an intent to kill or intent to cause great bodily harm theory), and (4) without justification. But in contrast to second-degree murder based on a depraved heart theory of malice, a conviction of manslaughter is appropriate if the killing occurred "in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Conversely, "[i]nvoluntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Id*. at 536. "[B]oth forms of manslaughter are necessarily included lesser offenses of murder. . . . Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. at 541.

This, of course, logically leads to questions about the drawing of lines and whether there are limits to the scope of a duress defense when raised in the face of an innocent life having been lost. If a successful duress defense is raised to felony murder under *Reichard*—which, assuming the evidence exists, requires that

first-degree murder charges be reduced to second-degree murder—does the same defense now apply to the second-degree murder charge? If so, could those charges hold water? And what about the defendant in this case? If she is successful in her attempt to raise a duress defense on remand, could the jury still find her guilty of the lesser included offense of manslaughter? The Court need not answer these questions today, but such questions loom and will need to be considered.

III. CONCLUSION

I join the majority today in recognizing that someone accused of *unintentional* second-degree murder (also known as depraved heart murder) can, in theory, raise a common law duress defense. But the Court's ruling today does not explicitly foreclose or endorse the possibility of being convicted of the lesser included offense of manslaughter after a successful duress defense has been asserted. Nor has the Court addressed who bears the burden of proof or persuasion for such a defense. In the absence of action from the Legislature, this Court will need to provide the answers.

BERNSTEIN, J., concurred with WELCH, J.

CLEMENT, C.J. (*dissenting*). I respectfully dissent from the majority's opinion recognizing duress as an affirmative defense to depraved-heart murder. Because I believe that the Court of Appeals reached the correct result below, I would instead affirm.

Duress is an affirmative defense which excuses a defendant's culpability for a crime under the theory that "it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the

other person." *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997), quoting 1 LaFave & Scott, Substantive Criminal Law, § 5.3, pp 614-615 (quotation marks omitted). This defense is not without limitation: a defendant asserting duress as a defense must satisfy various requirements regarding the extent of the threat, the timeliness of the threat, and the reasonableness of the defendant's reaction. See *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975). Further, and most relevant to the issue at hand, defendants facing charges of murder have historically been prohibited from asserting a duress defense. See *People v Reichard*, 505 Mich 81, 88-89; 949 NW2d 64 (2020). Early common-law commentators remarked that the logical premise underlying duress—that the law should encourage a threatened person to choose the lesser of two evils—should not be applied to the commission of murder, reasoning that a threatened individual "ought rather to die himself, than escape by the murder of an innocent." 4 Blackstone, Commentaries on the Laws of England, p *30. See also 1 Hale, History of the Pleas of the Crown, p 51 ("[I]f a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent[.]").

Relying on this historical commentary, our Court of Appeals initially recognized a blanket prohibition of the duress defense as to all homicide crimes in *People v Dittis*, 157 Mich App 38, 40; 403 NW2d 94 (1987), overruled by *Reichard*, 505 Mich at 90 n 18. However, in so doing, the *Dittis* Court did not engage in a thorough analysis of the common-law restrictions on the duress defense; it instead summarily concluded

that "[a]t common law duress is not a defense to homicide." *Dittis*, 157 Mich App at 40-41. Unexplained was whether the prohibition of duress applied to all homicide-related charges, only murder charges, or only certain types of murder charges. Subsequent caselaw cited *Dittis* for its broad prohibition, and that caselaw, too, failed to engage in a thorough review of this principle. See, e.g., *People v Henderson*, 306 Mich App 1, 5; 854 NW2d 234 (2014), overruled by *Reichard*, 505 Mich 81; *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996), overruled by *Reichard*, 505 Mich 81; *People v Travis*, 182 Mich App 389, 392; 451 NW2d 641 (1990), overruled by *Reichard*, 505 Mich 81.

Recently, this Court examined the duress prohibition in *People v Reichard* and concluded that duress should be available to a defendant accused of first-degree felony murder. *Reichard*, 505 Mich at 83. To prove first-degree felony murder, a prosecutor must demonstrate that the defendant committed second-degree murder during the course of a felony enumerated in MCL 750.316(1)(b); essentially, the commission of the felony elevates what otherwise would have been a second-degree-murder charge to a first-degree-murder charge. See *People v Aaron*, 409 Mich 672, 734; 299 NW2d 304 (1980). In *Reichard*, this Court reflected on the historical justification for the duress prohibition —that a threatened person should choose death over the murder of an innocent person—and concluded that it did not apply with equal force to felony murder because the threatened person is not presented with that same choice. *Reichard*, 505 Mich at 92. "Instead, in the felony-murder context, the individual faces a choice between whether to spare his or her own life or aid in a lesser felony (i.e., one that does not include as an element the killing of an innocent)." *Id*. This Court further reasoned that prohibiting the use of duress as

a defense to a felony-murder charge would be illogical where, had the second-degree murder and the felony been charged separately, the defendant would have been able to assert duress as a defense against the felony charge. *Id*. at 93. In sum, this Court concluded that duress is an available defense to first-degree felony murder because it can negate the enumerated felony that operates to elevate the murder from second degree to first degree. *Id*. at 95. Importantly, this Court did *not* conclude that duress would completely excuse the killing at hand, noting that a successful duress defense in the felony-murder context would still allow the prosecutor "to proceed against the defendant on the lesser included offense of second-degree murder if the evidence supported that charge." *Id*. at 95-96. In recognizing that duress should be available in the context of felony murder, this Court also expressly overruled *Dittis* to the extent that it applied to crimes beyond the first-degree-murder charge at issue in *Dittis*. *Id*. at 90 n 18.

Today, the majority concludes that the rationale expressed in *Reichard* regarding felony murder is also applicable to depraved-heart murder.[1] Depraved-heart murder is a colloquial term for a second-degree-murder charge brought under a specific theory of malice. "The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The prosecution may establish malice by proving that the defendant had one of three intents: "the intent to kill, the intent to inflict great bodily harm, or the intent to

[1] I agree with my dissenting colleagues that defendant waived this issue below and that, accordingly, this Court should not have addressed it. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984).[2] A second-degree-murder charge brought under this third and final theory of malice is what is known as depraved-heart murder. See *Aaron*, 409 Mich at 714.

The majority reasons that

> [t]he rationale for the no-duress-defense-for-murder rule is just as absent when depraved-heart murder is charged. Depraved-heart murder does not present the choice between sparing one's own life or taking the life of an innocent. It is not kill or be killed. Rather, the choice presented here is like the choice in *Reichard*: lose one's life or commit a lesser felony than intentional murder (here, reckless driving and fleeing from law enforcement).
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> . . . Because Gafken alleges that she chose to do the lesser evil, a duress defense is available. See *Lemons*, 454 Mich at 246.

I disagree with this rationale. Specifically, I dispute whether the choice to act with "the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result," *Dykhouse*, 418 Mich at 495, as depraved-heart murder requires, is meaningfully different than a choice of "taking the life of an innocent." Certainly, our common law (as adopted by the Legislature) does not see a meaningful distinction between these forms of malice. Keeping all other circumstances

[2] The third form has also been phrased as the "wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm." *Aaron*, 409 Mich at 728.

the same, a defendant with the intent to kill and a defendant with the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result will be found guilty of the same crime: second-degree murder.[3] That each form of malice results in second-degree murder reflects a moral and legal judgment that the wanton and willful disregard of the risk of death or of great bodily harm is just as depraved as the intent to kill or the intent to cause great bodily harm. For example, a defendant who, without premeditation or deliberation, shoots a firearm at a specific person in a mall intending to kill the victim is considered as depraved as the defendant who shoots a firearm into a crowd at the mall without the intent to kill but with the knowledge that doing so will very likely result in a person's death or great bodily harm, and both will be found guilty of the same crime. The majority is thus incorrect to characterize depraved-heart murder as a "lesser felony" than intent-to-kill murder because they are instead actually the *same felony* of second-degree murder, only brought under alternative theories of malice.[4]

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[3] Of course, first-degree murder also requires a finding of malice. First-degree murder is typically distinguished from second-degree murder in that it also requires a showing of premeditation and deliberation. MCL 750.316(1). Accordingly, if the circumstances at hand include premeditation and deliberation, the defendant with the intent to kill and the defendant with the intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm will result will both be found guilty of first-degree murder.

[4] To the extent that the majority relies on *Reichard* for its conclusion, I would emphasize that in *Reichard*, this Court held only that duress was a defense to first-degree murder insofar as duress applied to the underlying felony; this Court did not hold that duress could excuse second-degree murder. *Reichard*, 505 Mich at 95-96. In fact, this Court

A threatened person who has committed depraved-heart murder has engaged in the same prohibited choice described by Blackstone: to commit murder rather than lose one's own life. I would not differentiate among the theories of malice regarding the availability of the duress defense as the majority now does. Instead, I would conclude that, just as our common law imposes the moral standard that a threatened person cannot take a life to save their own, the same threatened person cannot act in a way that is nearly certain to cause death or great bodily injury to save their own life. The law has consistently treated these forms of malice the same, and I see no reason in either the majority opinion or the caselaw it cites[5] to differentiate between these forms of malice such that duress should be prohibited for a murder charge brought under one theory of malice and not the other.[6] Therefore, I dissent.

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explicitly explained that a successful duress defense as to a first-degree felony-murder charge would still allow the prosecution to pursue a second-degree-murder charge. *Id*.

[5] I agree with my dissenting colleagues that the caselaw the majority cites does not demonstrate that duress has historically been proscribed as a defense only when an intent-to-kill murder has been charged, nor does this caselaw demonstrate that duress is contemporarily proscribed as a defense against only intent-to-kill murder charges in most of our sister states.

[6] I would also note that the majority's new rule poses practical difficulties for future prosecutions. Even when a prosecutor proceeds under an intent-to-kill or intent-to-cause-great-bodily-injury theory of malice, a defendant could choose to argue that their intent instead reflected depraved-heart murder. Under this theory of the case, the duress defense would become available to the defendant. Accordingly, even when the prosecutor's theory of malice is "intentional," it is likely that the duress defense would be available to the defendant despite that all appear to agree that "intentional" killings are not subject to the duress defense. Although the jury in such a case could be instructed to consider the duress defense only as to the depraved-heart theory of malice, given the practical difficulty of proving a defendant's subjective

ZAHRA, J. (*dissenting*). The majority opinion reverses a murder conviction on the basis of a duress defense that defendant expressly waived at trial and failed to raise on appeal.[1] More astounding than the Court's

intent to kill, the most likely conclusion is that the jury will prefer to assess a defendant's actions under the more easily proven depraved-heart theory of malice—which will also now allow consideration of a duress defense. In sum, duress defenses are likely to now become available in most second-degree-murder prosecutions. While this does not mean that every second-degree-murder defendant will have a *successful* duress defense, it does mean that the scope of the majority's new rule is broader than it appears at first glance.

[1] When defendant, Theresa M. Gafken, initially sought to introduce evidence of Michael Scandalito's threat at the trial level, defendant conceded that duress is not a defense to depraved-heart murder. In response to the prosecution's argument that defendant was attempting to introduce a duress defense, defendant recognized that while her case was not one "where the defense of duress can be asserted," she claimed the evidence could nonetheless negate "the requisite state of mind." At a hearing, defendant reiterated that she was "without [a] duress defense . . . ." Defendant continued, explaining that she merely intended to introduce the evidence to negate intent, not to create a duress defense. The prosecution and the circuit court relied on this concession to understand and analyze defendant's request to admit evidence, ultimately concluding that the evidence would serve as a "backdoor way to get to a duress defense." Defendant's explicit and unambiguous concession of the issue, which served to benefit defendant's legal position, constituted waiver. See *People v Kowalski*, 489 Mich 488, 503-505; 803 NW2d 200 (2011) (explaining that a defense attorney's repeated statement that he had "no objection" to jury instructions constituted "waiver," leaving "no error to review"); *People v Traver*, 502 Mich 23, 40-41; 917 NW2d 260 (2018) (holding that a defense attorney's statement that he was "satisfied" with the circuit court's actions constituted a waiver of the argument that the court failed to provide an oral instruction); *United States v Walker*, 615 F3d 728, 733 (CA 6, 2010) (reasoning that a defense counsel's statement that he " 'does not dispute' " a legal position constituted "waiver," not just forfeiture).

Only after defendant had lost these arguments and the circuit court had ruled in the prosecution's favor did defendant change her position and argue that a duress defense was proper. By that time, the argument had been finally and irrevocably waived. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (explaining that a waived right is

disregard for longstanding principles of preservation is that the duress defense adopted in the majority opinion has never before been successfully embraced in American jurisprudence. Never. This case is a striking display of judicial overreach, accomplished through a short, cursory opinion, in which ipse dixit stands in the place of sound legal reasoning.

The majority rests its case on loose language from scattered sources that duress is not a defense to "intentional murder."[2] The cases relied upon by the majority at no point mention or discuss depraved-heart murder, and many held in favor of the prosecution and

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" 'relinquish[ed]' ") (citations omitted); *United States v Saucedo*, 226 F3d 782, 787 (CA 6, 2000) (reasoning that a waived argument is "forever foreclosed"); 28 Am Jur 2d, Estoppel & Waiver, § 186, p 651 ("It is well settled that a waiver once made is irrevocable even in the absence of consideration or of any change in position of the party in whose favor the waiver operates."); 31 CJS, Estoppel & Waiver, § 93, pp 442-443 ("A waiver when once made cannot be recalled, revived, expunged, or revoked, nor can the right waived be reclaimed, at least not without the consent of the adversary."). Recognizing that it had already resolved the issue, the circuit court denied defendant's request. On appeal, defendant returned to her initial position that duress is not a valid defense to a charge of depraved-heart murder. See, e.g., Defendant's Brief on Appeal (May 19, 2019) at 26 (arguing that the trial court could have given a jury instruction that stated "duress was not a viable defense"); Defendant's Application for Leave to Appeal in the Michigan Supreme Court (August 11, 2020) at 23 (same).

Given defendant's waiver, appellate review, let alone reversal, is inappropriate. *Carter*, 462 Mich at 215. But even if the Court used the more lenient "plain error" standard for untimely and unpreserved claims, reversal is not warranted. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Declining to accept a defense that has never before been recognized in Michigan, or anywhere else in this country, is a paradigmatic example of a challenge falling outside the plain-error standard. *People v Allen*, 507 Mich 597, 614; 968 NW2d 532 (2021) (stating that an error is "plain" only when it is "not subject to reasonable dispute") (quotation marks and citations omitted).

[2] See *ante* at 512-513 (majority opinion).

precluded a duress defense.[3] Unsurprisingly, whenever courts and other legal sources have directly addressed whether duress is available for any form of killing with malice, including depraved-heart murder, they have unambiguously rejected the majority's position.[4] Yet the majority relies on the lack of more extensive caselaw to *support* its position.[5] Instead, it may dem-

[3] See *People v Reichard*, 505 Mich 81, 88, 95-96; 949 NW2d 64 (2020) (stating that, at common law, "duress was not permitted as an affirmative defense to murder"; holding that duress could apply to lesser crimes in felony-murder prosecutions; and reasoning that the prosecution would, despite the existence of duress, "still be able to proceed against the defendant on the . . . offense of second-degree murder"); *Cole v State*, 221 So 3d 534, 543 n 4 (Fla, 2017) (concluding that trial counsel was not ineffective for failing to investigate a duress defense for charges of kidnapping, robbery, and first-degree murder and noting in passing that a duress defense was not applicable to the murder charges); *Commonwealth v Vasquez*, 462 Mass 827, 834-835; 971 NE2d 783 (2012) (rejecting the defense of duress for a murder based on "extreme atrocity or cruelty," which includes murder by depraved heart, and reasoning that "the duress defense for any form of murder would . . . encourage killing"); *Tully v State*, 730 P2d 1206, 1210; 1986 OK CR 185 (Okla Crim App, 1986) (explaining that the logic of duress did not apply to a felony-murder charge because "the harm contemplated" by committing robbery, on its own, was not greater than "murder of an innocent"—not mentioning or discussing killings with malice, such as depraved-heart murder).

[4] See, e.g., *Sanders v State*, 942 So 2d 156, 161 (Miss, 2006) (rejecting a duress defense for a depraved-heart murder conviction, reasoning that "duress is not a legal defense to murder"); *People v Anderson*, 28 Cal 4th 767, 774, 780; 50 P3d 368 (2002) (examining a statute that "adopted the common law" and concluding that "duress is not a defense to any form of murder," including murders with implied malice such as depraved-heart murder); *State v Rumble*, 680 SW2d 939, 941-943 (Mo, 1984) (reasoning that, by adopting the common law, "duress is not a defense to the crime of murder—any murder," which included "depraved-heart murder"); 40 CJS, Homicide, § 181, p 629 ("The rule encompasses denial of the defense to all forms of murder" given that "duress cannot, as a matter of law, negate . . . malice[.]").

[5] See *ante* at 513-514 (majority opinion).

onstrate that few serious jurists, before today, believed that a defendant could be acquitted of depraved-heart murder because of duress.

Moreover, the phrase "intentional murder," as used in the majority opinion, is an unhelpful pleonasm. All common-law murders are intentional. They all involve an intentional act. And they all either involve the intent to kill or the legal and moral equivalent to an intent to kill, otherwise described as "malice."[6] For centuries, our law has recognized that there is no legal, social, or moral reason to treat differently individuals who kill with intent to cause death and those individuals who kill with intentional disregard for human life.[7] In fact, depraved-heart murders can be and often are

[6] See *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984) (explaining that second-degree murder can be proved equally by "one of three possible intents: the intent to kill, the intent to inflict great bodily harm, or the *intent* to create a very high risk of death or great bodily harm with the *knowledge* that death or great bodily harm is the probable result") (emphasis added); *People v Potter*, 5 Mich 1, 7 (1858) ("[A]t the common law, if a mortal blow was malicious," such as with "a reckless disregard of the safety or lives of others, the killing would be murder, and would be punishable in the same manner as though perpetrated with the deliberate design of taking the life of the victim."); see also *People v Goecke*, 457 Mich 442, 467; 579 NW2d 868 (1998) (reasoning that depraved-heart murder requires the "intent to do an act," is a "general intent crime," and is "constructively with a malicious intention") (quotation marks and citation omitted); 21 Am Jur 2d, Criminal Law, § 113, p 230 (explaining the basic principle of criminal law that "general intent" requires "proof that the person acted intentionally" as opposed to "accident, mistake, carelessness, or absent-mindedness").

[7] See note 6 of this opinion; Coke, The Third Part of the Institutes of the Laws of England (6th ed), p 57 ("If a man knowing that many people come in the street from a sermon, throw a stone over a wall, intending only to fear them, or to give them a light hurt, and thereupon one is killed, this is murder[.]"); *Robinson v State*, 307 Md 738, 744-745; 517 A2d 94 (1986) ("The common law treats [the depraved-heart] state of mind as just as blameworthy, just as anti-social and, therefore, just as

more reprehensible, and more deleterious to our social fabric, than intent-to-kill murders. Yet the majority now gives depraved-heart murderers the benefit of a duress defense, and thus an unprecedented path to complete exoneration.[8]

The majority cites *People v Reichard*, 505 Mich 81; 949 NW2d 64 (2020), in support of its decision.[9] A complete analysis of that case and surrounding case-law suggests otherwise. In Michigan, "[w]hat was known at common law as the crime of murder . . . is now known under our statutory scheme as the crime of second-degree murder . . . ."[10] However, because felony murder requires only the "intent to commit a [lesser] felony," as compared to the "man-endangering-state-of-mind" of malice, Michigan has never recognized a common-law "felony murder."[11]

A similar logic underlay this Court's decision in *Reichard*.[12] The Court in *Reichard* permitted a duress defense against statutory felony-murder charges.[13] The Court did so because the underlying felony in felony murder "does not include as an element the killing of

truly murderous as the specific intents to kill and to harm.") (quotation marks and citation omitted); accord *Goecke*, 457 Mich at 466-467.

[8] *See People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975) (explaining that, if proven, "[a] successful duress defense excuses the defendant from criminal responsibility").

[9] See *ante* at 511-512 (majority opinion).

[10] *Dykhouse*, 418 Mich at 495, citing MCL 750.317.

[11] *People v Aaron*, 409 Mich 672, 723, 727-728; 299 NW2d 304 (1980) (quotation marks and citation omitted); see also *People v Pavlic*, 227 Mich 562, 565-566; 199 NW 373 (1924) (reasoning that an individual who merely commits a felony and thereby "unintentionally causes the death of another" is "not guilty of murder").

[12] *Reichard*, 505 Mich 81.

[13] MCL 750.316(1)(b).

an innocent," let alone malice; duress could negate the underlying felony only, which failed to constitute murder. And despite the applicability of duress to the underlying felony, the Court in *Reichard* confirmed that the prosecution "would still be able to proceed against the defendant on the lesser included offense of second-degree [common-law] murder if the evidence supported that charge."[14] Second-degree murder includes depraved-heart murder.[15]

It is incongruous, at best, to apply logic underlying this Court's rejection of felony murder as a common-law crime in toto to create a duress defense for a long-established form of common-law murder. Even more so when the primary case cited in favor of that defense explicitly rejected it. Reviewing other sources, it is apparent that the occasional use of the term "intentional murder" in the law of duress is designed primarily to distinguish between crimes lacking the elements of death and malice, i.e., lesser included offenses in "felony murder" prosecutions, and crimes that include both elements, i.e., Michigan's second-degree murder.[16]

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[14] *Reichard*, 505 Mich at 92, 95-96.

[15] See *Dykhouse*, 418 Mich at 495.

[16] See, e.g., 2 LaFave, Substantive Criminal Law (3d ed, 2017), § 9.7(b), pp 98, 100 (explaining that the common-law rule provides "duress cannot excuse murder" but reasoning that "intentional killing[s]" is more precise "since duress may excuse the underlying felony for what would otherwise be a felony murder" given the "unexpected[]" nature of felony murder; not mentioning depraved-heart murder whatsoever); *Tully*, 730 P2d at 1210 (reasoning that duress can be used to excuse felony murder because the defendant committed only a "lesser crime," "the harm contemplated by the defendant" in the case, robbery, was not equal to "*murder* of an innocent," and the common-law doctrine did not apply), citing LaFave, § 9.7(b) (quotation marks and citations omitted; emphasis added).

The consequences of the Court's actions are disconcerting. After today's ruling, murder defendants will have a strong incentive to describe their actions in terms of a conscious disregard for death rather than an intent to kill. Criminal defendants have expansive rights to present defenses and request jury instructions that fit their theory of the case.[17] Defendants may very well argue their actions fit within depraved-heart murder, even if they are charged with intent-to-kill murder. And once a depraved-heart theory is admitted, the majority opinion will allow a duress defense. It will be very difficult, if not impossible, for prosecutors or trial courts to discount a state of mind alleged by a defendant. Intentionally acting to kill another individual and intentionally acting with conscious disregard for another individual's life can facially exhibit little difference. "Yes, I intentionally shot at her knowing she was there, but I did not intend to kill her." Before today's decision, the difference between those two forms of intent in a second-degree murder prosecution would be largely one of semantics. After today,

[17] "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); compare *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995) (concluding that a requested instruction is not appropriate when "the record is devoid of any evidence supporting [the] jury instruction"), with *People v Dupree*, 486 Mich 693, 712; 788 NW2d 399 (2010) (holding that a trial court improperly refused a requested instruction when the defendant "satisfie[d] the initial burden of producing some evidence" supporting the instruction); 40A Am Jur 2d, Homicide (2019), § 463, p 358 ("Where there is any evidence tending, in an appreciable degree, to support a particular theory of a case, the court may give instructions to the jury presenting the theory to them, and it has been held that the defendant is entitled to have charges given if there is any evidence as a foundation therefor, regardless of the weakness, insufficiency, inconsistency, or doubtful credibility of the proof.").

however, the difference could decide whether a defendant is found guilty or acquitted.

Further, it is hard to see how the majority opinion will be limited to depraved-heart murders. Murders involving the intent to cause grievous bodily harm similarly lack an intent to cause death, or as the majority describes it, "intentional murder."[18] More than likely, the majority opinion will result in a sea change in the use of duress for homicide prosecutions.

The long-established principle that "duress is not a defense to murder" means exactly what it says.[19] This

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[18] See *Dykhouse*, 418 Mich at 495. At common law, the differences between depraved-heart murder and murder with intent to cause great bodily harm were minimal, if not nonexistent. See 4 Blackstone, Commentaries on the Laws of England, pp **199-200 (stating that tying a boy "to a horse's tail" to "drag[] him along the park," causing death, was murder, as was "beat[ing] another in a cruel and usual manner . . . though he did not intend his death").

[19] Blackstone, p *30 (stating that the "fear and force" underlying duress "shall not acquit him of *murder*") (emphasis added), citing 1 Hale, History of the Pleas of the Crown, p 51; *Reichard*, 505 Mich at 88, 95 (stating that, at the common law, "duress was not permitted as an affirmative defense to murder" and duress could not prevent a prosecution for "second-degree murder"); 40 Am Jur 2d (2019), Homicide, § 107, p 721 ("It is generally held that neither duress, coercion, nor compulsion are defenses to murder."); 40 CJS, Homicide, § 181, p 629 ("The rule encompasses denial of the defense to all forms of murder" given that "duress cannot, as a matter of law, negate the [element of] malice[.]"); 40 ALR2d 90, § 2.2, p 148 ("Defense of duress is not applicable to murder."); *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987) ("[D]uress is never a defense to murder[.]"), quoting *People v Young*, 120 Mich App 645, 653; 327 NW2d 329 (1982) (BEASLEY, J., dissenting on other grounds), overruled by *Reichard*, 505 Mich at 90 n 18, to the extent *Dittis*'s holding has been interpreted broadly as duress not being allowed as a defense to *any* "homicide."; *West v Bell*, 550 F3d 542, 555 (CA 6, 2008) ("[D]uress is never a defense to murder."); *United States v LaFleur*, 971 F2d 200, 205 (CA 9, 1991) (explaining, while interpreting the federal murder statute, that "the common law rejected duress as a defense to murder"), citing, in part, *Arp v State*, 97 Ala 5; 12 So 301 (1893); *United States v Buchanan*, 529 F2d 1148, 1153 (CA 7, 1975)

instinctive logic, passed down through generations of jurists, remains as powerful today as it did in centuries past: no forms of killing with malice can or should be excused on the basis of duress. Because the majority reverses a murder conviction on the basis of a duress defense never previously recognized in the history of this country, and does so despite the fact that defendant waived the issue, I respectfully dissent.

VIVIANO, J., concurred with ZAHRA, J.

VIVIANO, J. (*dissenting*). In a little over seven brisk pages, the majority comes to a conclusion that, as far as I can tell, has not been reached by any other common-law court: that the duress defense applies to depraved-heart murder. The few courts to have directly opined on the issue have, albeit in dicta, stated that the defense is inapplicable to this form of murder. And many courts and commentators have more broadly stated that duress does not apply to *any* charge of murder. None of this deters the majority, which ignores many of the relevant materials and misreads others. The resulting analysis is as flawed as it is cursory. The majority postures its case as a simple extension of *People v Reichard*, 505 Mich 81; 949 NW2d 64 (2020). But nothing in the holding or logic of *Reichard* supports the majority's result. Worse still, the majority reaches its result despite the fact that defendant, Theresa M. Gafken, conceded this very issue below. Therefore, the Court should not have decided this issue at all. But as it has done so, I would hold that duress is inapplicable to second-degree depraved-heart murder and therefore dissent.

("[C]oercion is not a defense to murder."), citing *RI Recreation Ctr v Aetna Cas & Surety*, 177 F2d 603 (CA 1, 1949).

I

In April 2018, a police officer saw a white Camaro, driven by defendant, speeding at around 50 to 60 miles per hour (mph) in a 25-mph zone. The officer activated his siren, and while defendant initially put on the Camaro's turn signal and slowed down, defendant then abruptly turned onto a second street and sped away from the officer. The officer was driving at around 90 mph, but defendant still pulled away from him. During the chase, defendant swerved between traffic lanes. Defendant eventually crashed after running a red light, sideswiping a truck and ramming into a Jeep. The driver of the Jeep was killed on impact. Data from the Camaro indicated that it was traveling at about 117 mph immediately before the accident in a 35-mph zone. There was no evidence of braking on the road. Defendant and the two other men who were in the Camaro sustained serious injuries.

Defendant was arrested and charged with second-degree murder. The officers' investigation revealed that defendant's blood contained tetrahydrocannabinol (THC), which is the main psychoactive substance found in cannabis, and that her driver's license was suspended. After her arrest, defendant stated that the men had asked for a ride and acted suspiciously. She intended to pull over. The next thing she remembered was sitting in the car after the accident.

Prior to trial, defendant filed a motion in limine to allow testimony that she acted out of fear for her life based on the actions of the other men in the car. Specifically, she wanted to testify that one of the men, Michael Scandalito, who was being sought for a parole violation—and for whom defendant knew an arrest warrant had been issued—had thrust a hard object into her ribs, which defendant believed to be a gun.

Believing she would be killed, defendant then sped away from the police. Defendant also requested that she be allowed to present evidence that this act triggered her post-traumatic stress disorder. The trial court noted that defendant wanted to establish either a duress defense or a diminished-capacity defense but rejected duress as inapplicable to second-degree murder and diminished capacity as not recognized in this state. The jury convicted defendant of second-degree murder.

Defendant appealed in the Court of Appeals, which held that the trial court did not err by excluding the evidence of duress. The Court noted that while *Reichard* had disapproved of a broad rule that "duress is not a defense to homicide," *Reichard* also "could be construed as suggesting that the Michigan Supreme Court would be open to allowing a duress defense . . . perhaps to even a charge of second-degree murder that is pursued solely on the malice prong regarding the creation of a very high risk of death or engaging in wanton and willful conduct." *People v Gafken*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2020 (Docket No. 345954), p 5 (quotation marks and citation omitted). However, because *Reichard* limited its own holding to felony murder, not second-degree murder, *People v Henderson*, 306 Mich App 1; 854 NW2d 234 (2014), overruled in part on other grounds by *Reichard*, 505 Mich 81, remained good law on this specific point, and defendant could not argue a duress defense. *Gafken*, unpub op at 5.

Thereafter, defendant sought leave to appeal in this Court. We ordered argument on the application to address, among other things, "whether the trial court erred in excluding evidence that the defendant was

threatened and of the defendant's mental state at the time of the offense[.]" *People v Gafken*, 508 Mich 961, 962 (2021).

II

A

As an initial matter, the majority should not have reached the question of whether duress applies. "Michigan has long recognized the importance of preserving issues for appellate review." *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). " 'In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.' " *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 709-710; 918 NW2d 756 (2018), quoting *Greenlaw v United States*, 554 US 237, 243; 128 S Ct 2559; 171 L Ed 2d 399 (2008). Accordingly, unpreserved issues are generally not reviewed. See *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987). And this would seem especially true if the party had, at some point in the proceedings, conceded the issue. Cf. *Mich Gun Owners, Inc*, 502 Mich at 709 (noting that the party had stated in this Court that it was not providing argument on the issue). As we recently explained, reviving unpreserved claims sends a bad signal to parties. *Id*. at 710 n 9 ("Granting leave to appeal under the circumstances presented would send a message that we should and do decline to send: Abandon an issue in your application for leave to appeal? And definitively distance yourself from that legal theory at oral argument? Worry not!

The Court will revive the theory for you and give you free rein to try again after hearing oral argument on that application.").

In the present case, this Court did order argument on the duress defense. But that was an imprudent mistake. In defendant's briefing in the Court of Appeals, defendant waived the duress defense, admitting that it was unavailable:

> In the present case, *the precluded evidence was not a means of claiming that Ms. Gafken was innocent of homicide*. That would clearly be prohibited by law. The only issue at trial was whether Gafken was guilty of second-degree murder or involuntary manslaughter. Clearly the disputed testimony was not intended to, nor could it, operate as a defense to homicide.

She included this exact same language in her application in this Court. Further, defendant argued that, to avoid any possible confusion by the jurors, the trial court could have given a jury instruction stating that "duress was not a viable defense to . . . second degree murder . . . ." Thus, as opposed to arguing that duress was a defense to murder, defendant claimed that evidence of Scandalito's threat could be used to negate the element of intent. By nevertheless taking up the duress-defense issue and deciding it in defendant's favor, the Court has acted improperly.[1]

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[1] It is true that the preservation requirement is not an absolute rule and that we sometimes address unpreserved issues. See *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). But that occurs, generally, when deciding the unpreserved issue is "'"necessary to a proper determination of a case . . . ."'" *Id*. (citation omitted). It is not clear to me how the applicability of the defense here was necessary to deciding the case. Indeed, the majority does not purport to decide the issue in order to resolve defendant's underlying argument—it decides the issue and does not opine on the argument defendant presented. And while the Court of Appeals below did address the duress defense, its

B

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Because the majority reaches the merits of this waived issue, however, I will do so as well to point out the flaws in its analysis. The majority's conclusion hinges on the premise that the duress defense is inapplicable only to *intentional* murders. Because (as discussed more below) second-degree murder under a depraved-heart theory is not an intentional murder, the duress defense applies, according to the majority. The majority's premise is simply incorrect and, not surprisingly, is based on loose dicta that does not reflect any actual holding by any court.

To understand the fulcrum of the majority's opinion, it is important first to examine the elements of second-degree murder: " '(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.' " *People v Wafer*, 509 Mich 31, 40; 983 NW2d 315 (2022) (citation omitted). All forms of murder require malice. *Maher v People*, 10 Mich 212, 218 (1862). For second-degree murder, there are three types of malice: (1) "the intent to kill," (2) "the intent to cause great bodily harm," and (3) "the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich

decision was unpublished and thus not binding. Moreover, it would have been simple enough to vacate the lower court's discussion of the issue. Justice WELCH's concurrence complains that "it would be unjust" to ignore this issue "merely because of a few sentences of her appellate attorney's argument in the Court of Appeals." Of course, that is exactly how preservation works—clients generally are held to the representations and choices of their attorneys in court. See *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000) (noting that although there are certain rights an attorney cannot waive, a defendant is bound by many of his or her attorney's decisions).

442, 464; 579 NW2d 868 (1998). We have also defined the third type of malice as "the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984).[2] As is clear, an intentional act is a necessary element of depraved-heart murder. It simply does not require the specific intent to kill.

When this third type of malice is at issue, the offense is known as "depraved-heart murder." See *Goecke*, 457 Mich at 464 & n 24. As described by LaFave, this form of murder encompasses "[e]xtremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or to others—though unaccompanied by any intent to kill or do serious bodily injury—and which actually causes the death of another . . . ." 2 LaFave, Substantive Criminal Law (3d ed, October 2022 update), § 14.4. The Model Penal Code explains it as homicide that "is committed recklessly under circumstances manifesting extreme indifference to the value of human life." Model Penal Code, § 210.2(1)(b) (2021). New York's top court has described it as follows:

> [D]epraved indifference is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not. Reflecting wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts, depraved indifference is embodied in conduct that is "so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy" as to render the actor as culpable as one whose conscious objective is to kill.

[2] For purposes of the discussion of the duress defense, it is irrelevant which definition applies.

> Quintessential examples are firing into a crowd; driving an automobile along a crowded sidewalk at high speed; opening the lion's cage at the zoo; placing a time bomb in a public place; poisoning a well from which people are accustomed to draw water; opening a drawbridge as a train is about to pass over it and dropping stones from an overpass onto a busy highway. [*People v Suarez*, 6 NY3d 202, 214; 844 NE2d 721 (2005) (citations omitted).][3]

See also *Maher*, 10 Mich at 219 ("[T]he act must be prompted by, or the circumstances indicate that it sprung from, a wicked, depraved or malignant mind—a mind which, even in its habitual condition and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton or malignant, reckless of human life, or regardless of social duty.").

Because this form of malice "may be established even absent an actual intent to cause a particular result," it is a general-intent crime. *Goecke*, 457 Mich

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[3] It is worth noting that numerous treatises stretching back to the English common law also provide as an example of depraved-heart malice the reckless driving of vehicles or horses—the historical antecedent of the conduct defendant was found guilty of here. See 1 East, A Treatise of the Pleas of the Crown, p 231 ("Thus, if a person, breaking in an unruly horse, wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder."); 1 Hale, History of the Pleas of the Crown, p 476 ("*A.* drives his cart carelessly, and it runs over a child in the street, if *A.* have seen the child, and yet drives on upon him, it is murder[.]"); Foster, *A Report of Some Proceedings* (Oxford: Clarendon Press, 1762), p 263 ("A person driving a cart or other carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder. For it was wilfully and deliberately done. Here is the heart regardless of social duty . . . .") (capitalization altered); see also Coke, The Third Part of the Institutes of the Laws of England (London: Rawlins, 1680), p 57 (explaining under the English common law that "[i]f a man knowing that many people come in the street from a sermon, throw a stone over a wall, intending only to fear them, or to give them a light hurt, and thereupon one is killed, this is murder").

at 466. In essence, the "malice is implied when the circumstances attending the killing demonstrate an abandoned and malignant heart," i.e., " 'when the defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with wanton disregard for human life.' " *Id*. at 467, quoting *People v Fuller*, 86 Cal App 3d 618, 628; 150 Cal Rptr 515 (1978). Depraved-heart murder therefore is not an intentional homicide in the traditional sense—it is not one in which the defendant actually intends to kill.[4]

The majority uses the lack of intent to kill to distinguish depraved-heart murder from other types of murder for purposes of the duress defense. A duress defense applies to excuse a defendant of a crime when the defendant can show:

> "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

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[4] See *Suarez*, 6 NY3d at 226 (Graffeo, J., concurring in part and dissenting in part) ("There is a readily understandable distinction between intentional and depraved indifference [i.e., heart] murders—the killer's state of mind. As we have recognized, a person can act intentionally by having the conscious objective to cause death, or recklessly by disregarding a known risk of death, but cannot act with both mental states simultaneously with regard to the same result. . . . Intentional and depraved indifference murder are also distinguishable because once the jury determines that a homicide was committed purposefully, 'the depravity of the circumstances under which the intentional homicide is committed is simply irrelevant.' This is so because an intentional killing is, by its very nature, ' "wanton . . . deficient in [ ] moral sense . . . [and] devoid of regard of the life or lives of others." ' ") (citations omitted).

> D) The defendant committed the act to avoid the threatened harm." [*Reichard*, 505 Mich at 88 (quotation marks and citation omitted).]

In *Reichard*, 505 Mich at 88, we explained the long-standing common-law rule that "duress was not permitted as an affirmative defense to murder." Mirroring the common law, our reference to murder there was not qualified, and elsewhere we "note[d] that several treatises state more precisely that duress is not an affirmative defense to *murder* or intentional homicide, as opposed to homicide generally." *Id*. at 90 n 18 (emphasis added). But we specifically declined to address whether duress applied only to "any form of homicide . . . ." *Id*.

2

To the extent we implied any answer to the present question in *Reichard*, it was in the negative, i.e., that duress would not apply to second-degree murder. *Reichard* explained that the application of duress to first-degree felony murder simply negated the aggravator element of MCL 750.316(1)(b), which elevates a second-degree murder to first-degree murder. *Id*. at 95. But, importantly, we stated that "[w]ith the aggravator element negated, a prosecutor would still be able to proceed against the defendant on the lesser included offense of second-degree murder if the evidence supported that charge." *Id*. at 95-96. "In other words," we concluded, "the defendant's duress defense to the underlying felony would only prevent the enhancement of second-degree murder to first-degree murder." *Id*. at 96. Addressing this language, federal courts after *Reichard* have continued to apply pre-*Reichard* caselaw from our Court of Appeals holding that duress is inapplicable to second-degree murder. See *Baker v*

Brewer, opinion of the United States District Court for the Eastern District of Michigan, issued May 5, 2021 (Case No. 2:15-CV-11629), p 8 (noting that *Reichard* stated that duress would only stop enhancement of a second-degree-murder charge to a first-degree charge and concluding that "[b]ecause petitioner was charged with, and convicted of, second-degree murder, duress was an unavailable defense in [the] case"), citing *People v Dittis*, 157 Mich App 38, 40; 403 NW2d 94 (1987).

Nevertheless, the majority misreads the treatises cited in *Reichard* and a few other cases to suggest that duress is inapplicable only to intent-to-kill murders. But this facile use of the sources is seriously flawed, as the majority seems to recognize when it states that "we are aware of no court that has considered the issue of whether duress can be raised as a defense to an unintentional homicide." Indeed, all the cases and sources the majority cites for support do not even discuss or analyze the matter, let alone decide whether duress applies to unintentional murders. For example, the court in *Cole v State*, 221 So 3d 534, 543 n 4 (Fla, 2017), observed in a footnote that "duress is not a defense to intentional homicide," but the opinion does not address at all the applicability of the defense to any form of homicide, much less murders in which the defendant lacks an intent to kill. (Quotation marks and citation omitted.) The charges in that case involved premeditated first-degree murder and felony murder. *Id*. In rejecting the defendant's assertion that his trial counsel was ineffective for developing a duress defense, the court examined the strategic merits of pursuing such a defense based on the facts in that case and the effect of failing to pursue the defense. *Id*. at 543-544. The opinion has absolutely nothing to do with the issue we face here.

Or consider the majority's truncated quotation of a leading treatise, 2 LaFave, Substantive Criminal Law (3d ed, October 2022 update), § 9.7(b). The full discussion states:

> But the case law in the absence of statute has generally held that duress cannot excuse murder—or, as it is better expressed (since duress may excuse the underlying felony for what would otherwise be a felony murder), duress cannot excuse the intentional killing of (or attempt to kill) an innocent third person. [*Id*.]

The author's limitation to intentional killings was obviously not intended to address all forms of murder, but instead felony murder. Again, as the majority notes, no court has addressed this issue, and thus none of the citations in the treatise supports the proposition that duress can apply to unintentional killings.[5]

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[5] Indeed, the treatise cites two cases, one of which is *Commonwealth v Vasquez*, 462 Mass 827, 835; 971 NE2d 783 (2012). As discussed below, see note 9 of this opinion, *Vasquez* indicates that duress is inapplicable even to forms of murder that lack an intent to kill. The other cited case, *Arp v State*, 97 Ala 5; 12 So 301 (1893), did not state that the duress defense is inapplicable only to intent-to-kill murders and did not address murders lacking an intent to kill.

Perhaps in a mark of what little thought has gone into the present question, some authorities have interchangeably used both broad and narrow phrasing of the rule, i.e., they say both that duress is not a defense to murder *and* it is not a defense to intentional murder or homicide. See 40 CJS, Homicide (November 2022 update), § 181 ("Generally, duress . . . is not a defense to a charge of homicide. . . . The rationale for denying the defense of duress to an intentional killing is premised on the theory that one should risk or sacrifice one's own life rather than take the life of an innocent person. The rule encompasses denial of the defense to all forms of murder, including homicides resulting from an intent to do grievous bodily harm, as well as an actual intent to kill and seems to include all other offenses where an intent to kill is an essential element."); see also *Wright v State*, 402 So 2d 493, 498 (Fla App, 1981) (quoting caselaw articulating the broad rule pertaining to all homicides and then adopting the narrow rule focused on inten-

The majority then limply asserts that other authorities suggesting a broader rule—"that duress is not a defense to 'murder' without qualification"—"generally . . . involve[] interpretation of a statute providing under what terms a duress defense can be raised." This is incorrect. Neither of the two common-law treatises (which were not addressing statutes) quoted in *Reichard* contained the narrower rule—both suggest duress was inapplicable to all killings, which is supported by English caselaw as well.[6] And numerous

tional homicides). Of course, all murders involve intentional acts, and the specific intent to kill is legally equivalent to the intent required for depraved-heart murder.

[6] See *Reichard*, 505 Mich at 88-89 (" '[I]f a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent[.]' ") (alteration in original), quoting 1 Hale at 51; *Reichard*, 505 Mich at 89 (" 'Another species of compulsion or necessity is what our law calls *duress per minas*; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. . . . This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences, so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.' "), quoting 4 Blackstone, Commentaries on the Laws of England, p *30. Lord Hale's treatise more clearly articulated the broader rule. See 1 Hale at 51 ("If a man be menaced with death, unless he will commit an act of treason, *murder*, or robbery, the fear of death does not excuse him, if he commit the act[.]") (emphasis added). Citing these treatises and other cases from the English common law, Lord Griffiths in the House of Lords in 1987—then England's highest court—observed that "[f]or centuries it was accepted that English criminal law did not allow duress as a defence to murder." *R v Howe* [1987] AC 417 (HL).

courts and other commentators (none of them addressing direct language in statutes) from early in the common law until the present likewise express the broader rule.[7] Some of the older sources note that

[7] See *Annachamy v Holder*, 733 F3d 254, 260 n 6 (CA 9, 2013) ("Duress does not excuse murder or even reduce murder to manslaughter. . . . And in many jurisdictions, duress does not excuse attempted murder or aiding and abetting murder either."), overruled on other grounds by *Abdisalan v Holder*, 774 F3d 517 (CA 9, 2015) (en banc); *Sanders v State*, 942 So 2d 156, 161 (Miss, 2006) ("[L]ongstanding Mississippi law holds that duress is not a legal defense to murder."); 40 Am Jur 2d (November 2022 update), Homicide, § 107 ("It is generally held that neither duress, coercion, nor compulsion are defenses to murder; nor does duress mitigate murder to manslaughter."); Mulroy, *The Duress Defense's Unchartered Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 San Diego L Rev 159, 172 (2006) ("The general common-law rule is that duress cannot be a defense to murder."); Reed, *Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence*, 6 J Transnat'l L & Pol'y 51, 58 (1996) ("The virtually unassailable position of Anglo-American common law has been that duress never excuses murder and that the threatened individual ought to die himself rather than escape by killing another human being."); Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S Cal L Rev 1331, 1343 (1989) ("[T]here is considerable authority or dictum for the proposition that the defense [of duress] may not be pleaded in murder prosecutions."); Snowden, *Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup*, 76 Neb L Rev 399, 445 (1997) ("Nebraska and most jurisdictions do not recognize duress in a homicide case."); cf. 1 Wharton's Criminal Law (16th ed, September 2022 update), § 15:9 ("At common law and by statute in many states, a defendant is not allowed to take the life of an innocent third person even when he is ordered to do so under a threat of instant death. . . . In prohibiting the duress defense in murder cases, the law demands heroic sacrifice on the part of the individual . . . .") (citations omitted); 1 East at 225 (citing Hale and writing that duress "is no legal excuse" for homicide if another had exerted "moral force" and made threats against a defendant "in order to compel him to kill" another).

The highest court in Massachusetts—one of the states that the majority cites as adopting the narrow rule, which is incorrect for many reasons, as discussed below—has more recently articulated the broad

duress was also inapplicable to other crimes not involving killing at all, including treason and robbery.[8] From this, it would appear that the more prevalent and longer-established version of the rule is the broader one.[9]

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rule, citing the very case the majority here cites as adopting the narrow rule. See *Commonwealth v Concepcion*, 487 Mass 77, 94; 164 NE3d 842 (2021) ("The defendant is correct: duress is not a defense to murder."), citing *Vasquez*, 462 Mass at 835.

[8] See, e.g., 1 Hale at 51.

[9] Justice WELCH's concurrence questions the accuracy of Lord Hale and Lord Blackstone's pronouncements on this matter, which have formed the basis for centuries of common-law jurisprudence. One would think that to mount such an attack, not only must there be convincing support for the historical assertion but also some rationale for overturning the last four centuries of law. The concurrence provides nothing of the sort. Instead, it cites a lone article, Elkington, *The Historical Development of Duress and the Unfounded Result of Denying Duress as a Defence to Murder* (Online First publication), J Crim L (2022), available at <https://journals.sagepub.com/doi/10.1177/00220183221093993> [Click "PDF / ePub"] (accessed December 12, 2022), which addresses the historical use of duress as a defense for treason in the context of war and rebellion, including in cases in which the defendant had killed. The scholar infers from this use of the defense that the defense would apply in cases of intentional killings. But treason and murder are different offenses, and nowhere does the scholar cite a historical case in which the defense was applied to the latter crime. Murder involves malice, which is a concept not at all mentioned by the scholar or apparently germane to treason. As explained above and below, malice for murder represents an express or implied intent to take a life. "The essence of high treason," by contrast, "was a treacherous usurpation of or challenge to the king's royal authority . . . ." Baker, *An Introduction to English History* (4th ed, 2002), p 526. The gravamen of the crimes are clearly different, even if death sometimes ensues during the commission of treason. Moreover, there are practical and political problems attending the prosecutions of treason post-rebellion that put further distance between the crimes. Many legal scholars over the centuries have questioned whether treason should be applied after armed rebellions. See Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York: Cambridge University Press, 2017), pp 261-265. In short, it is one thing to speculate on history in an academic article—it is another altogether to rely on the speculations when formulating the law for our state.

The majority is further incorrect that no courts have considered this issue. To be sure, the caselaw on this issue is sparse, and the relevant comments are arguably dicta. But the courts that have addressed the issue disagree with the majority. In *People v Anderson*, 28 Cal 4th 767; 50 P3d 368 (2002), the Supreme Court of California rejected the argument that duress could apply to first-degree murder. The concurring and dissenting opinions, the *Anderson* majority observed, argued that "duress especially should be a defense to implied-malice second degree murder. It evokes the image of an innocent person who is forced at gunpoint by fleeing armed robbers to drive recklessly, and who is then charged with murder when a fatal accident ensues." *Id*. at 779. The court ruled out duress in these circumstances, however. It stated, "Accepting the duress defense for any form of murder would . . . encourage killing." *Id*. at 778. And, later in the opinion, the court made the scope of its pronouncement even clearer: "we conclude that duress is not a defense to any form of murder." *Id*. at 780.[10] This has been repeated in numerous subsequent cases. See, e.g., *People v Hinton*, 37 Cal 4th 839, 882; 126 P3d 981 (2006) (" '[D]uress is not a defense to *any* murder . . . .' "), quoting *People v Maury*, 30 Cal 4th 342, 421; 68 P3d 1 (2003).

The majority here cites *Anderson*, but only partially, eliding its most relevant parts. Instead of a full and candid discussion of the case, the majority notes only *Anderson*'s suggestion that evidence of duress might still be relevant to determine whether the defendant acted with the requisite *mens rea* for murder. The majority therefore provides a misleading portrait of

[10] Because the charge at issue in *Anderson* was first-degree murder, the court's comments on other forms of murder were arguably dicta.

Anderson by failing to acknowledge that opinion's entire discussion of the very issue we are deciding here.

The majority also appears to distinguish *Anderson* on the basis that it involved a duress defense enshrined in a statute. See *Anderson*, 28 Cal 4th at 773, discussing Cal Penal Code, § 26. But the court held that the statute simply adopted the common-law defense of duress at the time of enactment. *Id*. at 774, 780. Significantly, the court noted that the common-law defense during that period was applicable to all murders. *Id*. Although at the time, all murder convictions were punishable by death, the court rejected the argument that the legislature meant to prohibit use of the duress defense only for murders subject to the death penalty. *Id*. at 774-775.[11]

The majority also mistakenly relies on *Commonwealth v Vasquez*, 462 Mass 827, 835; 971 NE2d 783 (2012), to support its narrow view of the rule. *Vasquez* actually discussed almost the precise issue before our Court and reached a conclusion far different than the majority's. The court stated, "[W]e hereby reject duress as a defense to deliberately premeditated murder, murder committed with extreme atrocity or cruelty, and murder in the second degree . . . ." *Id*. Under Massachusetts law, malice for second-degree murder requires an intent to harm, although not necessarily to kill. See *Commonwealth v Estremera*, 383 Mass 382, 394-395; 419 NE2d 835 (1981) ("The malice aforethought necessary for second degree murder requires a finding that the defendant intended to inflict injury on the victim without legal excuse or palliation. . . . Al-

[11] The court reached this conclusion even though the statute itself only excluded from the defense a "crime . . . punishable with death . . . ." Cal Penal Code, § 26.

though the defendant need not have intended to kill the victim, at the very least he must have intended 'to do an act creating a plain and strong likelihood that death or grievous harm will follow.' ") (citation omitted). This is similar to our depraved-heart murder to the extent that neither requires an intent to kill.

In a similar manner, first-degree murder in Massachusetts under an "extreme atrocity or cruelty" theory requires proof of malice aforethought and that the murder was committed with extreme atrocity or cruelty. *Commonwealth v Szlachta*, 463 Mass 37, 45; 971 NE2d 1281 (2012). Under Massachusetts law, malice is supplied not only by intent to kill, but also by an intent " 'to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow.' " *Id*. at 45-46 (citation omitted). No other intent is necessary. *Id*. at 47. Thus, it appears that a murder "with extreme atrocity or cruelty" can lack the intent to kill. This form of murder was at issue because two of the defendants were convicted of it. As a result, *Vasquez*'s ruling that duress is inapplicable to these forms of murder would seem to preclude use of the defense even in cases involving unintentional killings.[12]

It appears that the duress defense has been extended to the present circumstances only by statutes and model statutes. But in many states, the statutes have not extended the defense to depraved-heart mur-

[12] The court did note, however, that it had statutory authority in certain murder cases to "direct the entry of a verdict of a lesser degree of guilt" based on "any other reason that justice may require . . . ." Mass Gen Laws, ch 278, § 33E. The court observed that this authority might be invoked in these circumstances. *Vasquez*, 462 Mass at 835.

der.[13] And other states that allow the defense to apply to this form of murder limit its effect: duress is not a full defense but only reduces certain homicide charges to second-degree murder or manslaughter. Minn Stat

[13] See, e.g., Ala Code 13A-3-30 ("The defense [of duress] provided by this section is unavailable in a prosecution for (1) murder; or (2) any killing of another under aggravated circumstances"); Colo Rev Stat 18-1-708 (excluding the duress defense for Class 1 felonies, which under Colo Rev Stat 18-3-102(1)(d) contains a provision analogous to depraved-heart murder: "[u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another"); Ga Code Ann 16-3-26 (excluding duress from all murder offenses); Iowa Code 704.10 (excluding any offense pertaining to "an act by which one intentionally or recklessly causes physical injury to another"); Kan Stat Ann 21-5206(a) (excluding from the scope of the defense murder and voluntary manslaughter); La Stat Ann 14:18(6) (excluding murder); Mo Rev Stat 562.071(2) (excluding murder); Or Rev Stat 161.270(1) (excluding murder); Wash Rev Code 9A.16.060(2) (excluding "murder, manslaughter, [and] homicide by abuse").

An Arizona court applied such a statute in *State v Perez-Perez*, unpublished memorandum decision of the Arizona Court of Appeals, issued January 5, 2010 (Case No. 1 CA-CR 08-0689), p 1, in which the defendant drove away from the police, who were attempting to conduct a traffic stop—the pursuit ended in an accident that caused the death of another driver. The defendant claimed that a passenger in his car forced him to flee at gunpoint. *Id*. The defendant was charged with first-degree felony murder and second-degree murder; the jury was also given instructions on manslaughter. *Id*. The defendant was found guilty of second-degree murder. In Arizona, this offense is committed "when, '[u]nder circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person.' " *Id*. (citation omitted). This resembles our crime of depraved-heart murder. The defendant challenged a jury instruction that duress was not an excuse to this charge. The appellate court upheld the instruction, noting that under statutory law, duress was not a defense to any homicide. *Id*. at 2, citing Ariz Rev Stat Ann 13-412(C) ("The defense provided by subsection A [duress] is unavailable for offenses involving homicide or serious physical injury.").

609.20 (allowing the reduction to manslaughter for intentional killings); NJ Stat Ann 2C:2-9 (allowing the reduction to manslaughter in all cases of murder); Wis Stat 939.46(1) (allowing reduction of first-degree intentional homicide to second-degree intentional homicide). Other states would appear to allow the defense in the present circumstances.[14]

None of these statutes offers a firm ground for analogy here, not the least because they are the products of legislative rather than judicial action and thus their rationale is sometimes more opaque. The Model Penal Code (the MPC), for example, allows the defense for any charge when there exists "the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist." Model Penal Code, § 2.09(1) (2021). It is not allowed when, among other things, "the actor recklessly placed himself in a situation in which it was probable that he would be subject to duress." Model Penal Code, § 2.09(2) (2021). But the MPC goes much further than defendant is asking for here, and it is directly contrary to our law. Yet, it also contains a key restriction on use of the defense that the majority has not seen fit to craft here: that defendants not be reckless in placing themselves into positions that might involve duress. The majority appears to reject by silence this prudent and reasonable limitation on the defense.

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[14] Some states simply exclude the duress defense for crimes punishable by death. See, e.g., Idaho Code 18-201(4); Mont Code Ann 45-5-102(2), citing Mont Code Ann 56-18-222; Nev Rev Stat 194.010(8). Arguably by excluding the defense from certain crimes, an implication arises that it would be allowed for other crimes.

Perhaps lost in the majority's quibbling about the phrasing of the rule is any persuasive rationale for recognizing duress as a defense to unintentional murders. I do not see one.

Most importantly, the malice necessary for depraved-heart murder—which, as explained above, is an implied malice arising from an actor's disregard for the high risk of death posed by his or her conduct—has long been viewed as equivalent to an express malice consisting of an intent to kill. As one scholar described the development of this view, the concept of "malice aforethought . . . originally may have meant more or less what it sounds like—a deliberate, planned killing." Michaels, *Acceptance: The Missing Mental State*, 71 S Cal L Rev 953, 1003 (1998). But soon, the concept of malice was extended beyond that limited category to killings marked by recklessness or an intent to do great bodily harm. Moreland, *The Law of Homicide* (Indianapolis: Bobbs-Merrill Co, 1952), pp 13-15. Courts "concluded [these] killings that perhaps could not literally be described as including malice aforethought were nonetheless bad enough to 'deserve the extreme penalty' . . . ." *Acceptance*, 71 S Cal L Rev at 1003 (citation omitted).

With regard to depraved-heart murder, the process was straightforward. Misadventure had long been an established defense to homicide. *Law of Homicide*, p 14. It provided a defense for many unintentional homicides. But Lord Coke established two limitations on the defense, which had the effect of extending the murder offense to situations that would encompass

depraved-heart murder. *Id*. at 14-15.[15] For the misadventure defense, the killing had to occur while the defendant was engaged in a lawful act and without evil intent. *Id*. at 14-15, 256; see also *Black's Law Dictionary* (11th ed) (defining "misadventure" as "[h]omicide committed accidentally by a person doing a lawful act and having no intent to injure"). Thus, Lord Coke explained, "If a man knowing that many people come in the street from a Sermon, throw a stone over a wall, intending only to fear them, or to give them a light hurt, and thereupon one is killed, this is murder[.]" Coke, The Third Part of the Institutes of the Laws of England (London: Rawlins, 1680), p 57. This was because "he had an ill intent, though that intent extended not to death, and though he knew not the party slain." *Id*.

Accordingly, "[s]ome killings that were not purposeful or knowing . . . were added to the murder category under the rubric of 'implied' malice, including a category of 'depraved heart' murders, and were treated the same as knowing killings." *Acceptance*, 71 S Cal L Rev at 1003 (citations omitted); see also Michaels, *"Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism*, 100 Colum L Rev 54, 75-76 (2000) ("Depraved heart murder was a residual category designed to capture reckless killings that were as deserving of punishment as intentional murders."); Snowden, *Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup*, 76 Neb L Rev 399, 407-408 (1997) (noting that the category of implied malice "fit[] the older types of murders

[15] There were earlier cases that also helped lay the groundwork for the rise of implied malice. See Binder, *The Origins of American Felony Murder Rules*, 57 Stan L Rev 59, 76-80 (2004); *Second Degree Murder, Malice, and Manslaughter in Nebraska*, 76 Neb L Rev at 407-408.

(that were not premeditated) under the 'with malice aforethought' requirement" and that this reflected the moral sentiments of the courts). This was the common law that was received by the United States upon independence. *Acceptance*, 71 S Cal L Rev at 1003; see generally Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."). This remained true even when in the eighteenth century some jurisdictions began dividing murder into degrees, and it was part of the common law incorporated into the law of the United States upon independence. *Acceptance*, 71 S Cal L Rev at 1004 n 183.

The principle underlying this extension was that the malice necessary for depraved-heart murder was equivalent to that necessary for intent-to-kill murders. After Coke's treatise, "[l]ater writers in texts and decisions state[d] that such an individual has a 'depraved mind and a heart devoid of social duty' and should be guilty of murder equally with the felon who kills intentionally." *Law of Homicide*, p 15 (citation omitted). In one notable treatise, Sir James Fitzjames Stephen similarly explained that "malice means nothing but wickedness . . . ." 3 Stephen, A History of the Criminal Law of England, p 56. Thus, he noted, malice included "reckless indifference as to whether bodily injury was caused or not," because "[a]s far as wickedness goes it is difficult to suggest any distinction worth taking between an intention to inflict bodily injury, and reckless indifference whether it is inflicted or not." *Id*. at 55-56. Others concluded similarly, including the framers of the MPC, who stated that the MPC's analogous provision for reckless homicide "reflects the judgment that there is a kind of reckless homicide that

cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly." Model Penal Code, § 210.2, comment 4 (1980); see also *id*., comment 2 ("It seems clear . . . that some 'depraved mind' murders can properly be regarded as exhibiting the same disregard for the value of human life as intentional homicide and hence as deserving the same serious sanctions."); Hawley, *The Criminal Law* (Detroit: Collector Publishing Co, 1896), p 139 ("[B]y implied malice is meant that evil and malignant purpose, or state of mind, which prompts the act resulting in death in a case where there is no evidence of express malice toward the deceased. . . . In truth, the distinction between express and implied malice is of little value, and is more likely to confuse the mind than to lead to a clearer understanding of the crime of murder.").[16]

Courts, including ours, have likewise adopted this logic. In discussing the differences between manslaughter and second-degree murder, we stated:

> It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted *shall be equivalent in legal character* to a criminal purpose aimed against life. [*Wellar v People*, 30 Mich 16, 19 (1874) (emphasis added).]

The highest court in Maryland similarly emphasized that the culpability involved in depraved-heart murder was as great as that involved in intentional murders:

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[16] In regard to the MPC, it is worth repeating that it allows the duress defense to *all* murders, perhaps reflecting the above comments that deny a meaningful difference between depraved-heart murder and intentional killings.

> " 'It ["depraved heart" murder] is the form [of murder] that establishes that the wilful doing of a dangerous and reckless act with wanton indifference to the consequences and perils involved, is just as blameworthy, and just as worthy of punishment, when the harmful result ensues, as is the express intent to kill itself. This highly blameworthy state of mind is not one of mere negligence. . . . It is not merely one even of gross criminal negligence. . . . It involves rather the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not. The common law treats such a state of mind as just as blameworthy, just as anti-social and, therefore, just as truly murderous as the specific intents to kill and to harm.' " [*Robinson v State*, 307 Md 738, 744-745; 517 A2d 94 (1986) (citation omitted).]

Cf. *Mayes v People*, 106 Ill 306, 313-314 (1883) ("[I]t was utterly immaterial whether plaintiff in error intended the glass should strike his wife, his mother-in-law, or his child, or whether he had any specific intent, but acted solely from general malicious recklessness, disregarding any and all consequences. It is sufficient that he manifested a reckless, murderous disposition,—in the language of the old books, 'A heart void of social duty, and fatally bent on mischief.' A strong man who will violently throw a tin quart measure at his daughter—a tender child—or a heavy beer glass in a direction that he must know will probably cause it to hit his wife, sufficiently manifests malice in general to render his act murderous when death is the consequence of it. He may have intended some other result, but he is responsible for the actual result.").

Malice, therefore, was a holistic concept that, although it could be classed as express or implied, was not subject to division into different degrees of culpability based on whether the killing was intentional or unintentional. Cf. 3 Holdsworth, A History of English

Law, p 259 ("This expression 'malice aforethought' gradually comes to be the description of the worst form of felonious homicide; and, from the latter part of the fourteenth century, homicide of this kind comes to be known by the name of murder[.]"). One writer accordingly defined malice without regard to intent to kill, noting that such an intent is not implied by malice. Hughes, A Treatise on Criminal Law and Procedure, p 72 ("[Malice] does not imply ill-will or hatred, but, on the other hand, is something more than mere criminal intent. It does not, however, imply deliberation, nor does it imply intent to kill."). At the most basic level, " 'malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act . . . .' " *Id*., quoting *Commonwealth v Chance*, 174 Mass 245, 252; 54 NE 551 (1899). Accordingly, for centuries, malice was seen as "not so much malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved and malignant heart." Hughes, p 73.[17]

[17] See also 1 Michie, A Treatise on the Law of Homicide, § 11(2), pp 77-78 ("[M]alice as essential to the crime of murder has a more extended meaning, and is, or better say is characterized and manifested by, the intentional doing of a wrongful act towards another without legal excuse or justification, which may probably result in depriving such person of his life, and is not confined to an intention to take away the life of such person.") (citations omitted); 1 East at 214-215 ("[T]he sense of [the] word *malice* is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done malo animo, where the act has been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent upon mischief."); *A Report of Some Proceedings*, p 256 ("When the law maketh use of the term *malice aforethought* as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern use of the word *malice* is apt to lead one, *a principle of malevolence to particulars*. For the law by the

Under this reasoning, the presence of malice was seen as precluding any legal excuse, of which duress is an example. See *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975) (explaining that "[a] successful duress defense excuses the defendant from criminal responsibility"). One treatise quoted a 1484 decision in which the court stated that " 'in the legal acceptation it [i.e., malice] imports a wickedness which includes a circumstance attending an act that cuts off all excuse.' " 3 Stephen at 72 (citation omitted). Caselaw from this state has similarly linked implied malice—such as that under depraved-heart murder—to an intent to kill and explained that such malice is not susceptible to legal excuses. In *People v Potter*, 5 Mich 1, 9 (1858), we stated:

> But, malice aforethought is as much an essential ingredient of murder in the second degree, as in that of the first. Without this, the killing would be only manslaughter, if criminal at all. Now, malice aforethought is either express or implied, and there can be no case of murder in the first degree, except when committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, burglary, . . . when there does not exist *express* malice; while, in case of murder in the second degree, the malice is generally, if not universally, *implied*.

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term *malice* in this instance meaneth that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit.") (capitalization altered); cf. 4 Blackstone, Commentaries on the Laws of England, p *197 ("If a man . . . does such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended[.]").

Even those who have suggested that the concept of malice has shifted from "an underlying evil motive" to a "specific immediate intent" nonetheless recognize that malice extends to the intent "not to kill or even to injure, but to do some act with cause to know that it unwarrantably endangers human life . . . ." Sayre, *Mens Rea*, 45 Harv L Rev 974, 1019 n 184 (1932).

As the Court of Appeals has observed of this reasoning, first-degree murder usually requires an actual intent to kill, "while in second-degree murder [which includes depraved-heart murder] frequently there is no actual intent to kill and, therefore, generally, if not universally, the intent to kill is implied." *People v Morrin*, 31 Mich App 301, 327 n 39; 187 NW2d 434 (1971), citing *Potter*, 5 Mich at 9.

The function of this malice, as noted above, is to preclude legal excuses. The Court of Appeals has stated that " '[m]alice aforethought is the intention to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense to manslaughter.' " *People v Goodard*, 82 Mich App 424, 430; 266 NW2d 832 (1978), quoting *Morrin*, 31 Mich App at 310-311. Thus, the malice necessary for depraved-heart murder prevents the resort to the duress defense. This conclusion reflects the historical understanding of implied malice, which has always been considered equivalent to express malice and which is not subject to the duress defense.[18]

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[18] It is true, of course, that our statutes have separated murder into first and second degrees, with depraved-heart murder falling within the latter category. But this division, originally arising from Pennsylvania in the 1790s, reflected the fact that murder was punishable by death. See *Potter*, 5 Mich at 6-7. The distinction was drawn to separate punishments, not the basic definition of murder. *Id*. at 7 (" 'No objection was taken to the common law distinctions [of the types of crimes that all fell within the category of murder]. The general feeling was, that it was proper that they should remain. The question was one of *punishment*, not of *definition*.' ") (citation omitted); see also *Nye v People*, 35 Mich 16, 19 (1876) ("In dividing murder into degrees, its common-law qualities are not changed, but (except in special cases) the division is chiefly between cases where the malice aforethought is deliberate and where it is not."). Thus, the division of murder into different degrees stems from the sentiment that some types of murder are deserving of greater

The inclusion of unintentional killings in the category of murder reflects common moral intuitions and helps explain why depraved-heart murder is distinct from felony murder in respect to the duress defense. One scholar has explained that "there is no reason why unintentional killings, specifically depraved-heart killings, should inevitably be considered less culpable than, or only as culpable as, intentional ones." Dressler, *Rethinking Criminal Homicide Statutes: Giving Juries More Discretion*, 47 Texas Tech L Rev 89, 97 (2014) (emphasis omitted). "Critically," he stated, "our generally shared moral intuition is that someone who demonstrates, by his homicidal act, 'wickedness, evil or inhumanity,' or whose conduct is 'wanton [and] deficient in a moral sense of concern' for others, not only should be convicted of murder, but deserves to be treated as more culpable than some, perhaps many, intentional killers." *Id*. at 96 (citation omitted; alteration in original). As an example, consider two killings, one in which, on a whim, a person throws a child off a bridge, and another in which a son "carefully plans the mercy death of his ailing, pain-ridden, terminally ill father." *Id*. at 93. The latter killing is planned and premeditated, whereas in the former, the defendant might not specifically intend any harm. Yet, "one can easily understand how a jury, if permitted to do so, could find the merciful son less culpable than the baby killer." *Id*. at 97.

This line of reasoning further serves to distinguish depraved-heart murder from felony murder, which we addressed in *Reichard*. As noted above, under MCL

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punishment. It does not indicate that the underlying malice of second-degree murder is of a different nature, such that it would be susceptible to the duress defense.

750.316(1)(b), felony murder occurs when a murder is "committed in the perpetration of, or attempt to perpetrate," various specified crimes, such as kidnapping, torture, a major controlled substance offense, and unlawful imprisonment. This Court has observed that felony murder can cover "an accidental killing occurring during the perpetration of a felony," which involves less culpability than second-degree murder or even an involuntary manslaughter. *People v Aaron*, 409 Mich 672, 708-709; 299 NW2d 304 (1980). A leading treatise, similarly, has noted that "the risk of death may be much less for felony murder than is required for depraved-heart murder . . . ." 2 LaFave, § 14.5(e). Indeed, " ' "[t]he felony-murder rule applies whether a felon kills the victim intentionally, recklessly, negligently, or accidentally and unforeseeably." ' " Binder, *The Origins of American Felony Murder Rules*, 57 Stan L Rev 59, 61 (2004) (citations omitted). In this regard, it is noteworthy that felony murder exists in this state by virtue of statute, this Court having abolished common-law felony murder because we found "that the malice necessary for a felony-murder conviction cannot be inferred from the intent to commit the underlying felony alone." *People v Dumas*, 454 Mich 390, 397-398; 563 NW2d 31 (1997). As a result, it makes sense that duress could apply to felony murder but not to depraved-heart murder.

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The last, thin rationale offered to support the result today is that the purpose of the duress defense is inapplicable to killings in which the defendant lacked an intent to kill. The majority supposes that, unlike with intentional murder, depraved-heart murder does not present the defendant with a choice to kill or be

killed. Rather, it presents the defendant with the choice of creating the risk of killing someone or being killed. In other words, the depraved-heart-murder scenario only creates a probability of killing an innocent. The suggestion is that creating the risk of death is less blameworthy than intending to cause death.

The flaw in this argument is its underlying assumption that depraved-heart murder is materially distinct from intentional murder because the underlying conduct involves only the *risk* of death, whereas (presumably) the intentional murder presents the *certainty* of death. This is clearly wrong. Even the intentional-murder scenario is unavoidably probabilistic. Consider that, *ex ante*, the defendant cannot know with certainty whether his coercer will actually kill him or a loved one. It is only a probability. And, *ex ante*, even if the defendant intends to kill the innocent third person, there is only a risk of death—the defendant might botch the job.[19]

In this respect, it is noteworthy that even when a coerced defendant fails to murder an intended target and is charged with attempted murder, the common law would not allow that defendant to use the duress defense. See *Annachamy v Holder*, 733 F3d 254, 260 n 6 (CA 9, 2013) (noting that the duress defense is not available in many jurisdictions for "attempted murder or aiding and abetting murder"), overruled on other grounds by *Abdisalan v Holder*, 774 F3d 517 (CA 9,

[19] The only possible difference between intentional and depraved-heart murder, then, is that arguably the risk of death to the innocent third person is marginally higher in the former than the latter. Perhaps someone who intends to kill is more likely to do so than someone who creates a high risk of killing. This is a difference, if at all, in degree rather than in kind. And it is not the sort of difference susceptible to drawing bright lines, as it involves rough estimates of unquantifiable intuitions.

2015) (en banc); *Cawthon v State*, 382 So 2d 796, 797 (Fla App, 1980) (rejecting the duress defense in an attempted-murder charge and stating that the defense had never been available in Florida for such charges). As the Court of Appeals has stated, "Given that a defendant may not justify homicide with a claim of duress, it logically follows that a defendant cannot justify conduct intended to kill simply because he or she failed in the effort." *Henderson*, 306 Mich App at 7, overruled in part on other grounds by *Reichard*, 505 Mich at 89 n 18. The rule that duress is inapplicable to attempted murder demonstrates that the defense is inapplicable even when there is the mere risk of death, which is precisely the situation with depraved-heart murder. Further, to be charged with depraved-heart murder, someone must have actually died. Thus, while both forms of murder include aspects of risk and both result in death, the majority gives a windfall to the defendants who can demonstrate that they consciously disregarded the others' lives as opposed to possessing an intent to kill.

There is a further flaw in the majority's reasoning on this point. For the duress offense to apply, defendants themselves need not face the threat of death. Rather, duress applies when the coercion takes the form of the threat of death *or* serious bodily injury. *Reichard*, 505 Mich at 88. In light of the fact, as described above, that the defendant cannot know *ex ante* whether he would be killed or seriously harmed, the choice facing the defendant is the risk of death or serious bodily harm versus compliance with the coercer's demands. The majority's implicit lesser-evil reasoning—i.e., that the defendant's creation of the mere *risk* of killing another is a lesser evil than being killed—breaks down here. For example, under the majority's approach, defendants can invoke the duress defense when their con-

duct creates a "very high risk of death" even though they were threatened only with serious bodily harm. Defendants thus can choose what seems to be the greater evil and nonetheless invoke the defense.

III

For the reasons discussed above, I disagree with the majority's conclusion in this case, which the majority only reaches by disregarding defendant's waiver of the issue in the lower court. The majority's conclusion rests on scraps of dicta from cases and sources that were not considering the issue presented here. The only courts that have addressed the matter have rejected the majority's approach. In doing so, those courts better reflect the history of depraved-heart murder. Though this form of murder does not require an intent to kill, the malice needed for a conviction has always been viewed as equivalent to such an intent. And there is no other reason in law or logic to treat it differently for purposes of the duress defense. Certainly, the majority has not offered any such reasons. I therefore dissent.[20]

ZAHRA, J., concurred with VIVIANO, J.

[20] Our order granting argument on the application also requested briefing on "whether the trial court erred in its instruction to the jury as to the intent element of second-degree murder[.]" *Gafken*, 508 Mich at 962. The majority does not address this issue, and neither would I. Defendant has raised in this Court, for the first time, arguments concerning whether the standard for malice is objective or subjective. As amicus, the Prosecuting Attorneys Association of Michigan, contends, we should not address this complicated and unresolved question when it was not preserved below. At the very least, additional briefing would be required.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition July 28, 2022:

PEOPLE v POOLE, No. 161529; Court of Appeals No. 352569. On order of the Court, leave to appeal having been granted and oral argument having been held on March 2, 2022, we VACATE the order of the Court of Appeals dismissing defendant's delayed application for leave to appeal under MCR 6.502(G) and REMAND this case to that court for further proceedings consistent with this order.

Relevant to this appeal, defendant, John Antonio Poole, was convicted of first-degree murder, MCL 750.316, after his older uncle paid him to kill the victim, and defendant was given a mandatory sentence of life imprisonment without the possibility of parole. Defendant was 18 years old at the time of the murder. The Court of Appeals affirmed his convictions on direct appeal, and we denied leave to appeal. *People v Poole*, unpublished per curiam opinion of the Court of Appeals, issued December 5, 2005 (Docket No. 244023), lv den 476 Mich 863 (2006). Defendant has twice previously moved for relief from judgment, pursuant to MCR 6.500. This is his third such motion. Defendant challenges the validity of his mandatory life-without-parole sentence in light of *Miller v Alabama*, 567 US 460 (2012), which was determined to be retroactively applicable to cases on collateral review in *Montgomery v Louisiana*, 577 US 190 (2016). The trial court returned his motion, determining that *Miller* was not retroactively applicable to defendant's case. The Court of Appeals dismissed defendant's delayed application for leave to appeal, because defendant improperly sought to appeal the rejection of a successive motion for relief from judgment, citing MCR 6.502(G).

We conclude that the Court of Appeals erred by dismissing defendant's application for leave to appeal, because defendant has met the requirements necessary to file a successive motion for relief from judgment pursuant to MCR 6.502(G)(2). Specifically, we conclude that, as defendant argues for *Miller*'s protections to be extended to 18-year-old offenders, *Miller* and *Montgomery* serve as the "foundation" or "base" for defendant's challenges to the constitutionality of his mandatory life-without-parole sentence; thus, his motion is "based on a retroactive change in law" and overcomes the procedural bar in MCR 6.502(G). *People v Stovall*, 510 Mich 301 (2022) (concluding that *Miller* and *Montgomery* served as the "foundation" or "base" for the juvenile defendant's challenge to his life-with-parole sentence for second-degree murder). The trial court and the Court of Appeals erred by concluding otherwise.

Therefore, because the merits of defendant's motion were never considered under MCR 6.500, on remand, the Court of Appeals shall

determine whether defendant is entitled to relief based on our holding in *People v Parks*, 510 Mich 225 (2022), that *mandatory* life-without-parole sentences imposed on 18-year-old defendants are categorically disproportionate and thus unconstitutional under Const 1963, art 1, § 16. Under *Parks*, such offenders are entitled to the full protections and procedures afforded to juveniles in Michigan's sentencing scheme, MCL 769.25, including a consideration of the attributes of youth as described in *Miller*, 567 US at 477, prior to the imposition of a sentence for first-degree murder. The Court of Appeals shall determine what remedy, if any, is available to defendant under *Parks*, including whether defendant should be resentenced pursuant to MCL 769.25a. We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). But even if defendant could overcome the procedural bar, I would conclude that his constitutional argument fails for the reasons stated by Justice CLEMENT in her dissent in *People v Parks*, 510 Mich 225, 278-300 (2022).[1] For these reasons, I dissent.

CLEMENT, J. (*dissenting*). For the reasons stated in my concurring statement in *People v Manning*, 506 Mich 1033, 1038 (2020), I agree that defendant has met the procedural bar in MCR 6.502(G)(2) because his motion is "based on a retroactive change in law . . . ." However, for the reasons stated in my dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe defendant should be afforded relief on the merits, as he was 18 years old when he committed first-degree murder and I believe he is constitutionally subject to the mandatory sentence of life imprisonment without the possibility of parole that the Legislature has set out. Therefore, I dissent from the majority order remanding to the Court of Appeals and instead would deny leave to appeal.[1]

ZAHRA, J., joins the statement of CLEMENT, J.

PEOPLE V MASI, No. 163869; Court of Appeals No. 358922. By order of March 8, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the November 16, 2021 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to

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[1] Because the rest of my colleagues have reached this question, it is appropriate for me to likewise indicate my view. See *In re Certified Questions*, 506 Mich 332, 414 & n 21 (2020) (VIVIANO, J., concurring in part and dissenting in part).

[1] I would also clarify that under *Parks*, it is only *mandatory* life without parole that is unconstitutional for 18-year-old offenders. Just as with juvenile offenders, courts can sentence 18-year-old offenders to life without parole. See MCL 769.25.

MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v BEILMAN, No. 164032; Court of Appeals No. 359014. By order of May 6, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the January 28, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v STANSBERRY, No. 164127; Court of Appeals No. 359611. By order of May 3, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the January 20, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 28, 2022:

LAKESHORE GROUP v STATE OF MICHIGAN, No. 159033; Court of Appeals No. 341310. On April 6, 2022, the Court heard oral argument on the application for leave to appeal the December 18, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

BERNSTEIN, J. (*concurring*). Michigan has an expansive statutory scheme to protect the state's environment and natural resources, which is known as the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. The NREPA contains several subsections that are intended to regulate different aspects of the environment. Two NREPA subsections are at issue here: the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*., and the sand dunes protection and mining act (SDPMA), MCL 324.35301 *et seq*.

As the dissent notes, MEPA is of vital importance to Michigan, particularly given the constitutional directive to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Const 1963, art 4, § 52. Like Justice WELCH, I am troubled by some of the uncertainty and inconsistency in the interpretation of MEPA. However, there are a few reasons why this case does not present the proper vehicle for resolving those issues.

At issue in this case is plaintiffs' MEPA challenge to permits authorized by the Department of Environmental Quality (DEQ)[1] for a

[1] The DEQ is now known as the Department of Environment, Great Lakes, and Energy. Executive Order No. 2019-02.

plan to convert part of a critical dune area into a residential development. But these permits were issued under the SDPMA, not MEPA. Although the SDPMA does not outright say that it provides the exclusive pathway to challenging permits granted under its provisions, MEPA does not appear to offer an alternate route to challenging SDPMA permits.

First, the SDPMA places restrictions on who may challenge a permit. Contrast language in MEPA, which allows broad challenges by asserting that "any person may maintain an action," MCL 324.1701(1), against language in the SDPMA, which explains that "an applicant for a permit or . . . the owner of the property immediately adjacent to the proposed use [who] is aggrieved by a decision of the department in regard to the issuance or denial of a permit" may request a hearing, MCL 324.35305(1). The SDPMA thus limits those who may challenge a permit granted by the DEQ solely to property owners who are both immediately adjacent to the proposed use and who are aggrieved by the DEQ's decision. This is far more restrictive than the "any person" language used in MEPA.

Second, the SDPMA and MEPA also differ in noting what body first reviews challenges to permits. MEPA states that circuit courts have original jurisdiction. MCL 324.1701(1). But when SDPMA permits are challenged, a "hearing shall be conducted by the [DEQ] as a contested case hearing in the manner provided for in the [Administrative Procedures Act, MCL 24.201 *et seq*.]" MCL 324.35305(1).

Third, the standards of review in both subsections differ. The standard of review described in MEPA appears to favor permit challengers, and it explains that review is "*for the protection* of the air, water, and other natural resources *and the public trust in these resources* from pollution, impairment, or destruction." MCL 324.1701(1) (emphasis added). But the standard of review under the SDPMA appears to favor development, and it states that all permits "*shall be approved unless* . . . the [DEQ] determines that the use *will significantly damage the public interest* on the privately owned land . . . ." MCL 324.35304(1)(g) (emphasis added).

MEPA and the SDPMA both outline procedures dictating how DEQ-granted permits may be challenged. However, the procedures outlined under each subsection are significantly different from one another. When read together, it appears that MEPA provides general authorization for challenging a permitting decision, while the SDPMA provides specific authorization to challenge permitting decisions made under the SDPMA.[2] Accordingly, we apply the well-established canon of

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[2] Although MEPA contains a provision that says, "This part is supplementary to existing administrative and regulatory procedures provided by law," MCL 324.1706, this is hardly evidence that MEPA could provide an entirely different route for challenging SDPMA permits. MEPA does not define "supplementary," so we look to a dictionary to help us define it. *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 361 (2018). "Supplementary" is

statutory interpretation that holds that, in the event of a conflict, the more specific provision controls over the more general one. *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 645 (2012) (explaining that the canon has full application to statutes "in which a general authorization and a more limited, specific authorization exist side by side"); *TOMRA v Dep't of Treasury*, 505 Mich 333, 350 (2020). Because the SDPMA presents the more specific pathway to challenging permits authorized under the SDPMA and MEPA does not expressly state that an individual may use MEPA provisions to challenge SDPMA permits, plaintiffs' MEPA action must fail.[3] Otherwise, MEPA would seemingly create a workaround through which: (1) the statutory restrictions on who may challenge SDPMA permits would be rendered meaningless; (2) no permit challengers would be motivated to file their challenges within the DEQ as the SDPMA requires, if they could get a more favorable standard of review by raising a MEPA challenge; and (3) the DEQ's expertise, which the SDPMA appears to rely on by requiring

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defined, in part, as "[a]dded or serving as a supplement: additional." *Merriam-Webster's Collegiate Dictionary* (11th ed). "Supplement" is also defined, in part, as "[s]omething that completes or makes an addition." *Id*. This suggests that MEPA could complete any gaps in the SDPMA. As stated, there are no gaps to complete here, as the SDPMA provides its own process for challenging permitting decisions. To the extent that these definitions suggest that MEPA could allow for an *additional* process, it is unclear that the mere use of the word "supplementary" in MCL 324.1706 would allow individuals to ignore the specific process outlined in the SDMPA for challenging a SDPMA-granted permit. Our role in interpreting statutes is to give effect to every written word to effectuate the intent of the Legislature. *Apsey v Mem Hosp*, 477 Mich 120, 127 (2007) (citation omitted). The mere presence of the word "supplementary" in MEPA cannot lead to the conclusion that the more restrictive SDPMA process may be rendered meaningless. To find otherwise would violate the rule of statutory interpretation that no word of a statute should be made nugatory. *Id*.

[3] Plaintiffs present no caselaw showing that SDPMA permits may be challenged through the mechanisms outlined under MEPA. Even assuming that SDPMA permits could be so challenged, this case would not be an appropriate vehicle for interpreting MEPA provisions for two additional reasons. First, plaintiffs already raised a challenge to these permits under the SDPMA and this Court remanded to the administrative tribunal to conduct a hearing. *Lakeshore Group v Dep't of Environmental Quality*, 507 Mich 52, 57 (2021). Second, defendant argues, and plaintiffs do not contest, that the permits at issue may have already expired.

SDPMA permit challenges to originate within the DEQ, would be absent from the circuit court's primary review of the record.[4]

Although I share many of the dissent's concerns that this Court should ensure that MEPA is consistently and faithfully interpreted, I do not believe this case presents the proper opportunity to review the language of MEPA, as it more properly concerns the application of the SDPMA. Accordingly, I vote to deny leave.

WELCH, J. (*dissenting*). I respectfully dissent from this Court's denial order. In Michigan, "[t]he conservation and development of the natural resources of the state are . . . of paramount public concern in the interest of the health, safety and general welfare of the people." Const 1963, art 4, § 52. The Legislature was specifically directed in the Michigan Constitution to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." *Id*. In 1970, following its constitutional mandate, the Legislature led the national conservation and environmental protection movement by enacting the Michigan Environmental Protection Act (MEPA), 1970 PA 127. MEPA authorized "[t]he attorney general or any person" to file an "action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable

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[4] The dissent, while noting that these issues were not addressed by the lower courts, would welcome plaintiffs' invitation to revisit *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508 (2004). However, I do not read *Preserve the Dunes* as "depriv[ing] courts of the ability to debate the legal implications [of] the SDPMA's administrative-hearing and judicial-review provision . . . ; the competing jurisdictional statements . . . ; and the competing standards of review," as the dissent argues. (Second alteration in original.) Rather, *Preserve the Dunes* involved the interpretation of the MEPA alongside a *different* subsection of NREPA—the sand dune mining act (SDMA), MCL 324.63701 *et seq*.—and should thus not be binding on decisions related to the SDPMA. *Id*. at 511. Moreover, both the majority and dissent in *Preserve the Dunes* seemed to agree that the specific statutory language of the SDMA should control the analysis in that case. Compare *id*. at 519-520 (explaining that the three pathways to judicial review of an administrative decision include "the review process prescribed in the statute," which was unavailable in that case because the SDMA did not expressly establish such a process), with *id*. at 532-535 (KELLY, J., dissenting) (using the particular statutory requirements outlined in the SDMA to explain why there should be a cause of action under the MEPA). In short, I am not convinced that *Preserve the Dunes* prevents us from taking up a future case in which the parties have developed a lower-court record that tees up the proper interpretation of the MEPA as compared to the SDPMA. Nor am I convinced that we should overlook the specific procedural pathways articulated in the SDPMA in order to allow this MEPA challenge to move forward.

relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL 324.1701(1). This was the first environmental citizen-suit statute in the world, and it later served as inspiration for the citizen-suit provisions of the federal Clean Air Act and Clean Water Act. See Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 Ecology LQ 1 (1974). The author of the document that became MEPA was renowned environmental law scholar Joseph Sax. Professor Sax made clear in a 1972 article that MEPA was intended to be supplementary to all other environmental laws and regulations that were in existence or that might one day be enacted unless its applicability was suspended by the Legislature:

> Naturally, it is always open to the legislature to enact an explicit exception to [MEPA]. Just as they have enacted the law, so is it within their authority to modify it; but one ought to be cautious in reading implied modifications into statutes of general application such as [MEPA]. Moreover, when attempting to determine legislative policy, it is important to compare the present status of a 1970 law, like [MEPA], with that of some much older statute that is asserted to undercut [MEPA's] environmental mandate. [Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1003, 1063-1064 (1972).]

A few years later, this Court seemed to echo Professor Sax's understanding when it upheld MEPA's constitutionality and made clear that it "does more than give standing to the public and grant equitable powers to the Circuit Courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities." *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 306 (1975). "[T]he Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality." *Id*.

MEPA's applicability to a governmental body's final administrative approval of projects that will or are likely to harm the environment was unquestioned for decades. In 1972, Ralph MacMullen, then director of the Michigan Department of Natural Resources, was quoted as saying:

> "It is true that the Natural Resources Commission, upon my recommendation, approved construction. . . . It is likewise true that suit has been brought under [MEPA] by persons who disagree with that decision. The Act—one of the landmark pieces of environmental legislation in the nation—was passed for precisely that reason; to allow dissenting citizens an opportunity to register their dissents in court. Even though we have been made the defendants in this suit, we welcome it as an expression of public interest in the environment, and another step toward

> redefining the law so that we can better interpret the wishes of the people." [*Michigan's EPA: A Progress Report*, 70 Mich L Rev at 1004, quoting MacMullen, Letter to the Editor, Lansing State Journal (January 28, 1972), p A6 (italics omitted).]

This Court at one point similarly understood MEPA's clear language and intent, as demonstrated by its decision in *West Mich Environmental Action Council, Inc v Natural Resources Comm*, 405 Mich 741 (1979) (*WMEAC*). The plaintiffs in *WMEAC* brought a direct MEPA lawsuit against *permitting decisions by a state entity that authorized third-party conduct* that would cause harm or impairment to the environment and natural resources—specifically, oil and gas drilling in the Pigeon River Country State Forest. The Court first recognized that, pursuant to MEPA, the "*issuance of the permits to drill ten exploratory wells was properly* before the circuit court as *conduct alleged to be likely to* pollute, impair and destroy" natural resources. *Id*. at 751 (emphasis added). This Court not only held that the trial court erred by deferring to the agency's conclusions during environmental review, but it also held that issuance of the permits was likely to result in the impairment or destruction of the local elk population in violation of MEPA. *Id*. at 755-760. The Court therefore reversed and remanded the case to the trial court for entry of a "permanent injunction prohibiting the drilling of the ten exploratory wells pursuant to" the permits. *Id*. at 760. Importantly, like the facts alleged in this case, it was the Natural Resource Commission's administrative permitting decisions and its conclusions reached during an environmental review of the proposed project that were challenged in *WMEAC*, not the subsequent drilling conduct of the permit holder.[1]

In 2004, this Court held in *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508 (2004), without mentioning *WMEAC* or any conflicting Court of Appeals precedent, that MEPA does not authorize an indirect challenge to the issuance of a mining permit on the basis that an agency erred by determining that a company was eligible to apply for a permit under MCL 624.63702(1) and MCL 624.63704(2). *Id*. at 519. In reaching this conclusion, the Court stated that "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id*. Read one way, this statement could be understood to be inconsistent with *WMEAC* and with the rule that MEPA is "supplementary to existing

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[1] As recognized in Haynes, *Michigan Environmental Protection Act*, § 14.12, p 7, in Michigan Environmental Law Deskbook (Haynes ed, 2d ed), following *WMEAC*, the Court of Appeals has held that MEPA allows for direct lawsuits challenging the issuance of building permits, see *Comm for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 564-565 (1983), and "[i]t is apparent that although administrative conduct is sufficient to invoke the MEPA, the determinative point is whether that administrative action is the last hurdle in moving from the paperwork to the outdoors," *Wortelboer v Benzie Co*, 212 Mich App 208, 221 (1995).

administrative and regulatory procedures provided by law," MCL 324.1706, as the dissenting justices aptly recognized, *Preserve the Dunes*, 471 Mich at 525-526, 534-538 (KELLY, J., dissenting).

This Court overruled *Preserve the Dunes* in 2010. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69, 77 (2010) ("The permit from the DEQ serves as the trigger for the environmental harm to occur. The permit process is entirely related to the environmental harm that flows from an improvidently granted, or unlawful, permit."). But after the 2010 election and a change in the Court's composition, a majority of this Court granted a motion for reconsideration and vacated its prior decision as moot. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884 (2011).

In this case, the plaintiffs alleged, in part, that the issuance of the contested permits under the sand dune protection and management act (SDPMA), MCL 324.35301 *et seq*., as well as the manner in which the Department of Environmental Quality reviewed and processed sand dune permit applications, threatened the environment and natural resources, and thus violated MEPA.[2] At this point, no one disputes that plaintiffs have a right to sue the permittee under MEPA or to participate in the administrative review process. Legal proceedings are ongoing using those processes. Instead, in this action, the Court is asked to decide whether MEPA provides the plaintiffs a separate cause of action to sue the state agency directly under MCL 324.1701 to challenge the agency's review and issuance of the requested permits.

The Court of Appeals majority applied *Preserve the Dunes* as a blanket rule that denies the ability of persons to sue a state agency when the person claims that the issuance of a permit or license violates MEPA. The majority held that, "[s]imply put, the issuance of a permit is too far removed from the environmental harm to be actionable as 'conduct' under MEPA." *Lakeshore Group v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 341310), p 4. The majority further held that the plaintiffs' only options were to utilize the administrative appeal process under the Administrative Procedures Act, MCL 24.201 *et seq*., or to sue the permit holder directly under MEPA, MCL 324.1701, but they could not challenge a permitting decision in a lawsuit without first going through the administrative review process.[3]

The dissenting judge read *Preserve the Dunes* as foreclosing direct MEPA challenges against purely procedural administrative decisions

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[2] The SDPMA—originally enacted by 1976 PA 222—and MEPA are both subparts of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., following the enactment of legislation that consolidated several laws concerning Michigan's environment and natural resources. See 1994 PA 451.

[3] This statement appears inconsistent with the recognition in *Preserve the Dunes* that MEPA "does not require that a plaintiff exhaust administrative remedies." *Preserve the Dunes*, 471 Mich at 538.

that have "no relevance to or impact on the environment . . . ." *Lakeshore Group* (RONAYNE KRAUSE, J., dissenting), unpub op at 3. However, she did not believe *Preserve the Dunes* "insulate[d] all administrative determinations from MEPA challenges *per se*," and she would have remanded the case and instructed the trial court to "evaluate[] each of the DEQ's alleged errors to determine whether they had a proximate causal connection to the alleged environmental harm." *Id*.

The Court of Appeals' decision in this case demonstrates that *Preserve the Dunes* has been read to foreclose *all* direct MEPA challenges against government agencies that are based on the issuance of a permit or license authorizing third-party conduct that will or is likely to harm the state's natural resources. I believe this presents a matter of practical and jurisprudential importance, and I would have granted the application for leave to appeal. If the Court of Appeals majority's reading of *Preserve the Dunes* is correct, then *Preserve the Dunes* is in conflict with *WMEAC*. There would have been no basis for this Court, under *Preserve the Dunes*, to conclude that the "issuance of the permits . . . was properly before the circuit court," *WMEAC*, 405 Mich at 751, or to grant permanent injunctive relief to the plaintiffs.

But Judge RONAYNE KRAUSE and the plaintiffs in this case raised compelling arguments that would allow the Court to harmonize the *Preserve the Dunes* decision with *WMEAC* by limiting the former to procedural or intermediate administrative decisions that are disconnected from the final approval authorizing harmful conduct. This would leave both decisions in place while still allowing a person to pursue a MEPA action challenging an agency's final permitting decision that required the agency to determine whether the proposed conduct would cause unlawful harm to the environment or natural resources.

Additionally, it is critical to remember that the SDPMA and most other modern environmental regulatory and permitting laws did not exist in Michigan when MEPA was enacted in 1970. Even the Administrative Procedures Act of 1969 was in its infancy when MEPA was passed. Recognizing that more laws and regulations would be enacted, the Legislature declared that MEPA is "supplementary to existing administrative and regulatory procedures provided by law." MCL 324.1706. MEPA also granted circuit courts authority to permit third parties to intervene in administrative proceedings, MCL 324.1705(1), or, in original MEPA actions, to direct parties to seek relief in administrative, licensing, or other proceedings as is necessary and available, MCL 324.1704(2). In the latter situation, the court is to retain jurisdiction, MCL 324.1704(4), and after the administrative proceedings have concluded, the "court shall adjudicate the impact of the defendant's conduct on the" natural resources at issue or the public trust in those resources, MCL 324.1704(3).

To alleviate the risk of endless litigation, "collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits." MCL 324.1705(3). If the Legislature intended to insulate state permitting decisions from lawsuits brought under MEPA, then surely it would have said so expressly rather than having set forth a pathway for how litigation should proceed. For example, the Legislature could have

declared that a contested case hearing and subsequent appeal are the *exclusive* means of challenging such decisions under the relevant permitting statute or that MEPA does not apply.[4] I also find compelling this Court's prior statement that the final issuance of a permit "serves as the trigger for the environmental harm to occur" and that "[t]he permit process is entirely related to the environmental harm that flows from an improvidently granted, or unlawful, permit," *Anglers of the AuSable*, 488 Mich at 77, vacated 489 Mich 884. At a minimum, permitting decisions that require an agency to evaluate the environmental impacts of the proposed conduct are directly connected to the actual conduct that final approval process authorizes.

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[4] The administrative-hearing provision of the SDPMA, MCL 324.35305(1), states that a permit applicant or the "owner of the property immediately adjacent to the proposed use" who are "aggrieved" by the permitting decision have a statutory right to request a formal contested case hearing under MCL 24.201 to 24.328. No provision of the SDPMA refers to MEPA. But the scope of individuals who have a right to a contested case hearing under MCL 324.35305, which is a distinct administrative proceeding, is obviously narrower than those to whom MEPA granted the right to file an original action or request intervention. See MCL 324.1701; MCL 324.1704; MCL 324.1705.

I disagree with the concurrence's suggestion that the clear mandate that MEPA be "supplementary to existing administrative and regulatory procedures provided by law," MCL 324.1706, renders it a gap-filler that only applies when the Legislature has not provided another path for administrative or judicial review. I agree that to be "supplementary" is best understood as being an addition to something. But this suggests that MCL 324.1706 should be harmonized with other environmental statutes in the absence of an irreconcilable conflict. See, e.g., *Hannay v Dep't of Transp*, 497 Mich 45, 57 (2014) (" '[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole,' " and " 'a word or phrase should be given meaning by its context or setting.' ") (citation omitted); *Nowell v Titan Ins Co*, 466 Mich 478, 482 (2002) (providing that "provisions of a statute that could be in conflict must, if possible, be read harmoniously"). Reading the SDMPA as restricting a direct action under MEPA by implication and without attempting to harmonize these neighboring environmental statutes effectively negates MCL 324.1706. Such a reading also arguably conflicts with the express language in MCL 324.1706 and MCL 324.1704(3) and (4)—all of which contemplate the existence of additional statutes or procedural mechanisms—and MCL 324.1701(1), which grants the "attorney general or any person" a direct cause of action that is not limited by proximity to the location of the proposed use. This Court has not grappled with these issues.

The concurrence opines that this case does not present the "proper opportunity to review the language of MEPA, as it more properly concerns the application of the SDPMA." But the potential for conflict between provisions of MEPA and the SDPMA was not addressed by the courts below. Nor could those courts have reached that issue, because *Preserve the Dunes* has been interpreted as a blanket prohibition against filing a MEPA action to challenge an agency's permitting decision that authorizes third-party conduct. The current reading of *Preserve the Dunes* would seem to deprive courts of the ability to debate the legal implications of the SDPMA's administrative-hearing and judicial-review provision, MCL 324.35305; the competing jurisdictional statements under MCL 324.1701(1) and MCL 324.35305(1); and the competing standards of review under MCL 324.1701 and MCL 325.35304(1)(g). In other words, so long as all agency permitting decisions that authorize third-party conduct are insulated from third-party MEPA challenges, there will be little opportunity to analyze the intricacies of how MEPA interacts with an agency's duties under specific permitting statutes. The Court's decision to deny leave in this case effectively ensures that these issues will remain unresolved.

I am troubled by the inconsistencies between the Court of Appeals' interpretation and application of *Preserve the Dunes* in this case and this Court's decision in *WMEAC* and the "common law of environmental quality," *Ray*, 393 Mich at 306, that developed in the time between the two decisions. Accordingly, I question the correctness of the Court of Appeals majority's decision in this case. The Court has missed an opportunity to clarify its precedent and the applicability of MEPA to final administrative decisions authorizing conduct that will or is likely to harm our state's natural resources or the public trust in those resources. I would have granted leave to appeal or resolved this case on the merits. I respectfully dissent from the Court's decision to do neither.

MCCORMACK, C.J., and CAVANAGH, J., join the statement of WELCH, J.

HEINRICH v PETTWAY, No. 162413; Court of Appeals No. 349954.

PEOPLE v CLARK, No. 162770; Court of Appeals No. 355461.

PEOPLE v JONES-HILL, No. 163584; Court of Appeals No. 352354.

PEOPLE v HAYNES, No. 163645; reported below: 338 Mich App 392.

AKF, INC v RESTORATION SERVICES HOLDING, LLC, No. 163737; Court of Appeals No. 352216.

PEOPLE v VANBENNEKOM, No. 163803; Court of Appeals No. 352554.

PEOPLE v HEAD, No. 163841; Court of Appeals No. 352966.

PEOPLE v SHANNON, No. 163910; Court of Appeals No. 358320.

PEOPLE v LORENTZ, No. 163912; Court of Appeals No. 358703.

WELCH, J. (*concurring*). I concur with the majority's decision to deny leave to appeal. I write separately due to my concerns about whether the record was sufficient to support the assignment of 10 points for offense

variable (OV) 4. MCL 777.34(1) (psychological injury to victim). A trial court is directed to assign 10 points where a preponderance of the evidence establishes that a "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Subsection (2) clarifies that 10 points are appropriate "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). The Court of Appeals has held that a "trial court may assess 10 points for OV 4 if the victim suffers, among other possible psychological effects, personality changes, anger, fright, or feelings of being hurt, unsafe, or violated." *People v Armstrong*, 305 Mich App 230, 247 (2014). This generalized statement seems to gloss over the Legislature's intent that the injury be *serious* and that it *require professional treatment* and instead allows 10 points to be scored for nearly any psychological injury. Every victim of a crime surely suffers some degree of psychological harm, as such experiences are, as a general matter, frightening and traumatic. But if the Legislature intended all psychological injuries to require the scoring of OV 4 at 10 points, then it would have written the statute to say so explicitly. See *People v McChester*, 310 Mich App 354, 364 (2015) (GLEICHER, J., concurring) ("Had the Legislature intended that a sentence enhancement would automatically attach to every crime causing any psychological injury, it would not have included the terms 'serious' and 'requiring professional treatment' in OV 4."). In *People v White*, 501 Mich 160, 162 (2017), we held that "points for OV 4 may not be assessed solely on the basis of a trial court's conclusion that a 'serious psychological injury' would normally occur as a result of the crime perpetrated against the victim" and that "evidence of fear while a crime is being committed, *by itself*, is insufficient to assess points for OV 4." If the preponderance of the evidence does not demonstrate that the psychological injury is serious enough to require treatment, then zero points are to be scored. MCL 777.34(1)(c) (providing that no points are to be scored if "[n]o serious psychological injury requiring professional treatment occurred to a victim").

I have no doubt that the victim of defendant's crimes suffered some psychological injury, but the record in this case is shockingly sparse as to the seriousness of the harm. The victim recanted or walked back many of the most severe allegations against defendant at the preliminary-examination hearing. There is no evidence that the victim sought counseling or any other professional treatment. According to the presentence investigation report, while the victim apparently said that what defendant did "would be with her for a long time," she told the author of the report that she had support and was "doing OK." In fact, the victim requested that "any no-contact order [be] lifted so she may take the defendant's daughter to visit him." The victim did not testify at defendant's sentencing hearing, and it does not appear that she submitted a written statement. Thus, we do not know any further details about the psychological harm that defendant's conduct caused to the victim. I question whether this minimal record is factually or legally sufficient to justify a 10-point score for OV 4. However, because a 10-point reduction in the score of OV 4 would not entitle defendant to resentencing under

People v Francisco, 474 Mich 82 (2006), and because I do not believe defendant's other arguments warrant review by this Court, I respectfully concur.

PEOPLE v SKALUBA, No. 163959; Court of Appeals No. 349660.

CAVANAGH, J., did not participate due to a familial relationship.

PEOPLE v TAMPLIN, No. 163971; Court of Appeals No. 358795.

PEOPLE v DEJA DAVIS, No. 164061; Court of Appeals No. 351935.

WALNUT CREEK COUNTRY CLUB v LYON TOWNSHIP, No. 164085; Court of Appeals No. 351980.

ARMSTRONG v GARY, No. 164088; Court of Appeals No. 351258.

JAVOR v TOWNSHIP OF PLYMOUTH, No. 164111; Court of Appeals No. 356238.

PEOPLE v GLENN WILLIAMS, No. 164113; Court of Appeals No. 359287.

PEOPLE v VIRGIES, No. 164124; Court of Appeals No. 350475.

FAKHER-ELDIN v STATE AUTO INSURANCE COMPANY, No. 164138; Court of Appeals No. 358848.

PEOPLE v MCNEES, No. 164149; Court of Appeals No. 358821.

PEOPLE v DEMETRIUS BRADLEY, No. 164176; Court of Appeals No. 355549.

PEOPLE v HAWKINS, No. 164183; reported below: 340 Mich App 155.

PEOPLE v MCNEIL, No. 164189; Court of Appeals No. 352262.

PEOPLE v ROSINSKI, No. 164216; Court of Appeals No. 352919.

PEOPLE v KASANKIEWICZ-COOK, No. 164217; Court of Appeals No. 358036.

ALUDYNE, INC v ANDERTON INDUSTRIES, INC, Nos. 164236 and 164237; Court of Appeals Nos. 356014 and 356030.

PEOPLE v MCKAY, No. 164242; Court of Appeals No. 354700.

PEOPLE v WESSERLING, No. 164244; Court of Appeals No. 359998.

PEOPLE v GRABIEC, No. 164245; Court of Appeals No. 359250.

In re GUARDIANSHIP OF DAVID P VANPOPPELEN and *In re* CONSERVATORSHIP OF DAVID P VANPOPPELEN, Nos. 164251, 164252, and 164253; Court of Appeals Nos. 353319, 353320, and 356664.

PEOPLE v BEMBENECK, No. 164255; Court of Appeals No. 352561.

PEOPLE v KUZMA, No. 164264; Court of Appeals No. 359864.

PEOPLE v MICHAEL LEWIS, No. 164273; Court of Appeals No. 354783.

PEOPLE v SORENSON, No. 164280; Court of Appeals No. 354892.

PEOPLE v PETROELJE, No. 164285; Court of Appeals No. 359934.

PEOPLE v LEIGH, No. 164294; Court of Appeals No. 358901.

PEOPLE v CHERRY, No. 164295; Court of Appeals No. 359540.

PEOPLE v SUTHERBY, No. 164296; Court of Appeals No. 359334.

PEOPLE v DUSTIN CAIN, No. 164299; Court of Appeals No. 359714.

PEOPLE v BERNARD, No. 164301; Court of Appeals No. 358499.

IAFRATE v ANGELO IAFRATE, INC, No. 164306; Court of Appeals No. 355597.

PEOPLE v BANKS, No. 164314; Court of Appeals No. 359670.

PEOPLE v WATSON, No. 164316; Court of Appeals No. 358732.

PEOPLE v RIVERA, No. 164319; Court of Appeals No. 359932.

PEOPLE v RIGOT, Nos. 164320 and 164321; Court of Appeals Nos. 355003 and 355004.

PEOPLE v FISHER, No. 164323; Court of Appeals No. 353601.

JMP v BC, No. 164327; Court of Appeals No. 356237.

PEOPLE v MUSKA, No. 164329; Court of Appeals No. 360378.

PEOPLE v BOBZIEN, No. 164333; Court of Appeals No. 359581.

PEOPLE v ABED, No. 164334; Court of Appeals No. 354393.

ER DRUGS v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 164340; reported below: 341 Mich App 133.

GULL POINTE PHARMACY v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 164343; Court of Appeals No. 358856.

PEOPLE v POZNIAK, No. 164344; Court of Appeals No. 358977.

In re FEEK, No. 164346; Court of Appeals No. 359256.

DULIN v LAKELAND CORRECTIONAL FACILITY WARDEN, No. 164347; Court of Appeals No. 358607.

PEOPLE v STREU, No. 164350; Court of Appeals No. 354784.

PEOPLE v POPE, No. 164355; Court of Appeals No. 352161.

In re ECH, No. 164353; Court of Appeals No. 358205.

CLEMENT, J. (*dissenting*). I would reverse the decision of the Court of Appeals. I have no views on whether the trial court's decision is correct or not, but I do not believe the Court of Appeals properly applied the standard of review, and I would reverse on that basis.

Appellant is the father of two children. He and the mother of the children were divorced in 2017, and the judgment of divorce conferred joint legal custody on the divorcing parents and physical custody on his ex-wife. It also included a parenting-time schedule, but this went unenforced. His ex-wife subsequently remarried, and in 2021, she and her husband petitioned for a stepparent adoption. Under the Michigan Adoption Code, MCL 710.21 *et seq*., they were required to prove that appellant, "having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition," MCL 710.51(6)(b), in order to terminate his parental rights and confer those rights on the children's stepfather. The trial court held that the statute could not be satisfied because appellant "made regular and substantial communications with mom to be involved with the kids, communicate with them, visit them," while their mother "frustrate[d] those attempts or den[ied] those attempts on a lot of requests," which meant that the petitioners could not show that the father had "the ability to visit, contact, or communicate with" the children.

Petitioners then appealed in the Court of Appeals, which reversed and directed that the petition advance to an evaluation of whether the adoption would be in the best interests of the children. It held that respondent had the *ability* to "visit, contact, or communicate with" his children because the judgment of divorce that was entered when his marriage to his wife ended provided him with a right to parenting time that he did not seek to enforce judicially. *In re ECH*, unpublished per curiam opinion of the Court of Appeals, issued April 7, 2022 (Docket Nos. 358205 and 358206), p 4. In doing so, it noted that the Court had previously held in *In re SMNE*, 264 Mich App 49, 51 (2004), that—in the context of a stepparent adoption—a parent to whom a court has awarded parenting time in a judgment has the ability to see their children under MCL 710.51(6)(b). *ECH*, unpub op at 4. The Court of Appeals also held here that "the evidence does not support that petitioner blocked respondent from visiting the children or speaking to them through Facetime or phone" because "[s]everal of respondent's requests for visits were last-minute or otherwise not consistent with" the conditions set out in the divorce judgment for exercising parenting time, and in any event, respondent "never mailed the children birthday or holiday cards or presents." *Id*. at 4-5. Respondent now appeals in this Court.

Unless a legal parent's parental rights have been terminated for some other reason, to grant a stepparent adoption, one legal parent's rights must be terminated. "A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted," with "findings of fact [reviewed] under the clearly erroneous standard." *In re Hill*, 221 Mich App 683, 691-692 (1997). We have held that a factual finding "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46 (1976) (quotation marks and citation omitted).

I do not believe this standard of review has been properly applied here. Under the Court of Appeals' interpretation of *SMNE*, a divorcee who does not resort to litigation to enforce parenting-time rights they may enjoy under a court judgment apparently waives any objection to a stepparent adoption they might otherwise lodge under MCL 710.51(6)(b). I disagree with this reading of both *SMNE* and the statute. In *SMNE*, 264 Mich App at 51, the trial court held that the petitioning parents had satisfied the statute, and the Court of Appeals affirmed because, in light of the respondent's "legal right to visit with the child under the terms of the divorce judgment," "she should have sought assistance from the friend of the court or the divorce court . . . ." But in light of the deferential standard of review, I believe there is a significant difference between an appellate court *affirming* a trial court's decision to hold that the statute has been satisfied on this basis and *reversing* a trial court's decision because of the existence of a parenting-time judgment. A trial court that invokes the existence of parenting-time rights is likely doing so in response to its implicit evaluation that it saw enforcing those rights as a realistic and not merely theoretical option for the parent—i.e., considering the parent's resources, experience with the legal system, and relationship with the other parent. Indeed, *SMNE* itself gestures toward such an evaluation, since the Court said that the respondent "should have sought assistance from the friend of the court or the divorce court, *as she had done in the past*." *Id*. (emphasis added). Where there is no such past history, there may be a reason for it—such as the respondent parent's desire to avoid conflict with their former spouse for the sake of the children. In construing what qualifies as a parent's "ability" to be in contact with their children under the statute, it would seem to me to be poor public policy to essentially require the parties to resort to preemptive litigation in order to avoid waiving any objection under MCL 710.51(6)(b). I similarly disagree that an appellate court can be "left with the definite and firm conviction that a mistake has been committed" because respondent did not send his children cards and gifts. While a reasonable fact-finder could certainly identify that as a reason to hold that a parent had not been in adequate contact with their children, a reasonable fact-finder could *also* find that young children in the twenty-first century would not find cards or letters to be a meaningful form of contact; and, if the custodial parent obstructed the noncustodial parent's ability to be in touch with the children, that other parent may not have a sense of what to spend their potentially limited resources on as a gift.

I would not construe *SMNE* as holding that a parent's failure to enforce the terms of a judgment of divorce is a per se waiver of any objection to a stepparent adoption that parent may have under MCL 710.51(6)(b). And with reasonable ways of construing the facts in favor of both sides of this case, I believe the Court of Appeals was obliged to affirm under the "clearly erroneous" standard of review. I would therefore reverse that Court and affirm the trial court's decision to dismiss this petition.

MCCORMACK, C.J., joins the statement of CLEMENT, J.

In re NBH, No. 164358; Court of Appeals No. 358206.

CLEMENT, J., dissents for the reasons set forth in her dissenting statement in *In re ECH*, 510 Mich 865 (2022).

MCCORMACK, C.J., joins the statement of CLEMENT, J.

PEOPLE v CODY, No. 164365; Court of Appeals No. 354178.

PEOPLE v MURRAY, No. 164372; Court of Appeals No. 359926.

PEOPLE v LEWIN, No. 164374; Court of Appeals No. 359321.

NEWMEYER v DEPARTMENT OF HEALTH AND HUMAN SERVICES, No. 164379; Court of Appeals No. 355509.

PEOPLE v KEENAN KING, No. 164382; Court of Appeals No. 359261.

MEMBERSELECT INSURANCE COMPANY v MEISTER, No. 164384; Court of Appeals No. 359762.

PEOPLE v HUDSON, No. 164391; Court of Appeals No. 355863.

PEOPLE v SANDERS, No. 164398; Court of Appeals No. 359566.

PEOPLE v HELLER, No. 164400; Court of Appeals No. 360327.

PEOPLE v GARTLEY, No. 164403; Court of Appeals No. 360339.

PEOPLE v PRESSWOOD, No. 164404; Court of Appeals No. 360036.

PEOPLE v GEORGE, No. 164405; Court of Appeals No. 360364.

PEOPLE v THORPE, No. 164408; Court of Appeals No. 355292.

PEOPLE v TUNSTALL, No. 164411; Court of Appeals No. 358797.

PEOPLE v BADER, No. 164432; Court of Appeals No. 356938.

PEOPLE v BENNETT, No. 164452; Court of Appeals No. 360681.

PASUPULETI v MURDAUGH, No. 164471; Court of Appeals No. 358384.

PEOPLE v PLANK, No. 164515; Court of Appeals No. 360768.

PEOPLE v TAWFIK, No. 164617; Court of Appeals No. 360797.

Superintending Control Denied July 28, 2022:

HOLTON v ATTORNEY GRIEVANCE COMMISSION, No. 164324.

Reconsideration Denied July 28, 2022:

PEOPLE v THOMAS, No. 163231; Court of Appeals No. 349711.

PEOPLE v BOWLING, No. 163349; Court of Appeals No. 354545.

PEOPLE v MOTT, No. 163390; Court of Appeals No. 356426.

WHITE v MICHIGAN STATE UNIVERSITY UNEMPLOYMENT COMPENSATION DIVISION, No. 163548; Court of Appeals No. 356513.

In re JAMES EDWARD WHITE, No. 163562; Court of Appeals No. 356364.

PEOPLE v DARREN JOHNSON, No. 163681; Court of Appeals No. 358309.

PEOPLE v MARTIN, No. 163709; Court of Appeals No. 357630.

PEOPLE v GATES, No. 163723; Court of Appeals No. 357730.

PEOPLE v REAVES, No. 163801; Court of Appeals No. 352348.

PEOPLE v NELSON, No. 163809; Court of Appeals No. 357351.

PEOPLE v BRANDON CAIN, No. 163864; Court of Appeals No. 357985.

PEOPLE v BRANDON CAIN, No. 163865; Court of Appeals No. 357933.

PEOPLE v MARK WILLIAMS, No. 163944; Court of Appeals No. 358088.

NEHR v NEHR, No. 163950; Court of Appeals No. 358122.

PEOPLE v SAMUEL AMBROSE, No. 164042; Court of Appeals No. 358390.

PEOPLE v CHILDS, No. 164078; Court of Appeals No. 358603.

PEOPLE v SUTTON, No. 164096; Court of Appeals No. 358416.

CALLAHAN v MAROTA, No. 164167; Court of Appeals No. 359879.

CALLAHAN v MAROTA, No. 164169; Court of Appeals No. 359880.

PEOPLE v JACKSON, No. 164241; Court of Appeals No. 359568.

Summary Disposition August 12, 2022:

PEOPLE v OSLUND, No. 164621; Court of Appeals No. 360675. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the July 6, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. We further ORDER that trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied August 12, 2022:

PEOPLE v MARCUS MCCLOUD and PEOPLE v BRUCE EDWARDS, Nos. 163060 and 163061; Court of Appeals Nos. 352158 and 352280.

VIVIANO, J. (*dissenting*). The Court today forgoes an opportunity to examine an interesting and legally significant question: whether police

may briefly detain and pat down a third party to facilitate an undercover operation against other individuals or entities. Because I believe that the Court should further explore this question by granting leave to appeal, I dissent from the Court's order denying leave to appeal.

In this case, the Detroit Police Department received several complaints about an after-hours club selling liquor without a license. The police verified that the club did not have a liquor license and planned an undercover operation to determine whether the club was indeed selling liquor. As part of the operation, two officers were assigned to briefly detain the club's security personnel so that undercover officers could enter and attempt to buy alcohol. Department policy required undercover officers to enter with their weapons for their own safety, and club security would not have allowed them to do this. Accordingly, on the night of the operation, the two officers approached the club as decoys before the undercover officers. The first officer entered the building and, after defendant Bruce C. Edwards identified himself as club security, the officer detained Edwards and escorted him outside the club before patting him down and finding a handgun. Then, a second officer entered and found defendant Marcus McCloud, another security guard. The second officer similarly escorted McCloud outside, patted him down, and discovered a firearm.

Defendants moved to suppress the evidence obtained from the detention, arguing that the police did not have probable cause or reasonable suspicion to search them without a warrant. The trial court denied the motions. In a subsequent bench trial, both defendants were found guilty of carrying a concealed weapon without a license. In an unpublished per curiam opinion, the Court of Appeals reversed the convictions and remanded for further proceedings. Judge RIORDAN dissented, pointing out that a police officer may detain an individual briefly and conduct a pat-down search for officer safety, even without individualized suspicion of wrongdoing. The prosecutor now seeks leave to appeal in this Court.

At issue is whether the officers' actions violated the Fourth Amendment's prohibition on unreasonable searches and seizures. See *Terry v Ohio*, 392 US 1 (1968). Police officers may make a limited search of a person if they possess "reasonable suspicion that criminal activity may be afoot." *People v Oliver*, 464 Mich 184, 193 (2001). In particular, a police officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, 392 US at 30. "Such a search," the Court held, "is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken." *Id*. at 31. In these circumstances, "the intrusion on the citizen's privacy '[is] so much less severe' than that involved in a traditional arrest that 'the opposing interests in crime prevention and detection and in the police officer's safety' could support the seizure as reasonable." *Michigan v Summers*, 452 US 692, 697-698 (1981) (citation omitted).

In the present matter, defendants argue, and the Court of Appeals majority agreed, that the officers did not have an individualized suspicion that defendants were armed or engaged in criminal activity. But, as Judge RIORDAN noted in his dissenting opinion, several United States Supreme Court cases indicate that the police may order brief stops and pat-downs "for the purposes of officer safety even in the absence of any individualized reasonable suspicion . . . ." *People v McCloud*, unpublished per curiam opinion of the Court of Appeals, issued April 22, 2021 (Docket Nos. 352158 and 352280) (RIORDAN, J., dissenting), p 2, citing *Maryland v Wilson*, 519 US 408, 413 (1997). The United States Supreme Court has made clear that individualized suspicion is not an absolute prerequisite for every constitutional search or seizure:

> The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. Thus, while this Court's jurisprudence has often recognized that "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976), we have also recognized that the "Fourth Amendment imposes no irreducible requirement of such suspicion," *id*., at 561. Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be "reasonable" under the Fourth Amendment. [*Samson v California*, 547 US 843, 855 n 4 (2006)].

In the typical cases dispensing with the individualized-suspicion requirement, a valid search pursuant to a warrant is being undertaken, or a valid investigatory stop based on reasonable suspicion is made. During that search or stop, the police conduct a pat-down or detention of a third party (i.e., someone who is not the target of the investigation or stop) without reasonable suspicion that the third party has engaged in a crime. For example, as Judge RIORDAN noted, two circuits of the United States Court of Appeals have held that such stops are permissible "at the scene of police activity in which it may be reasonable for police to detain people not suspected of criminal activity themselves, so long as the additional intrusion on individual liberty is marginal and is outweighed by the governmental interest in conducting legitimate police activities safely and free from interference." *United States v Howard*, 729 F3d 655, 659 (CA 7, 2013); see also *United States v Lewis*, 674 F3d 1298, 1306 (CA 11, 2012) ("[F]or safety reasons, officers may, in some circumstances, briefly detain individuals about whom they have no individualized reasonable suspicion of criminal activity in the course of conducting a valid *Terry* stop as to other related individuals."). In *Howard*, the officer had probable cause to arrest an individual whom the officer believed was armed and dangerous. *Howard*, 729 F3d at 657. The

court determined that the officer properly detained the defendant, a third party who exited the same vehicle as the target suspect. *Id*. In *Lewis*, the officers approached four men in a high-crime area and asked them if they were carrying weapons. *Lewis*, 674 F3d at 1300-1301. Two of them responded in the affirmative, giving the officers reasonable suspicion to detain them. *Id*. at 1301, 1305. The court concluded that the officers were justified on the basis of officer safety in also holding two other men, including the defendant, who did not state that they were carrying weapons, even absent any particularized reasonable suspicion that they also carried weapons. *Id*.

The United States Supreme Court has similarly held that an officer making a legitimate traffic stop may briefly detain passengers and order them out of the car, *Maryland*, 519 US at 410, and that when officers have a search warrant for a home, the police may detain the occupant while the home is being searched, *Michigan v Summers*, 452 US 692, 704-705 (1981). And the Idaho Supreme Court recently held that the "suspicionless detention of a third party," a woman who was present during a routine parole search of a parolee's residence, as " '[d]epartment procedure to ensure officer safety,' " was constitutional. *State v Phipps*, 454 P3d 1084, 1086-1087 (Idaho, 2019).

The instant case presents the question of whether police officers conducting an undercover operation may briefly detain and pat down third parties without individualized suspicion. As a general matter, it does not appear that reasonable suspicion or probable cause is a requirement for undercover operations.[1] Therefore, the Court of Appeals majority raised a valid concern about police officers being able to stop and frisk any third party without a warrant or reasonable suspicion in the name of safety just because an undercover operation is underway. But it seems unlikely that a court would countenance such an intrusion in the absence of at least reasonable suspicion. In any event, I believe a strong argument could be made that the police here did have a

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[1] See generally Ross, *Undercover Policing and the Varieties of Regulatory Approaches in the United States*, 62 Am J Comp L 673, 675 (2014) (discussing caselaw and noting that "undercover operations in the United States are not regulated by statute and may be initiated without obtaining a warrant or establishing probable cause or even reasonable suspicion that a crime is being committed"); see also *People v Jamieson*, 436 Mich 61, 90 n 22 (1990) (opinion by BRICKLEY, J.) ("This is not to suggest that the state must have reasonable suspicion or probable cause before an undercover investigation is undertaken."); *United States v Kelly*, 228 US App DC 55, 66 n 58 (1983) (noting United States Circuit Courts of Appeals that have "rejected the argument that the government must have reasonable suspicion of wrongdoing before proceeding with an undercover operation"); cf. *Jacobson v United States*, 503 US 540, 557 (1992) (O'Connor, J., dissenting) (noting that the Court had never before required reasonable suspicion before the police could begin an investigation and that the majority opinion should not be misread to require such suspicion).

reasonable suspicion that criminal activity was afoot. *Terry*, 392 US at 30. "An anonymous tip, when sufficiently corroborated, can exhibit sufficient indicia of reliability to justify a *Terry* stop." *People v Pagano*, 507 Mich 26, 33 (2021). Here, the record indicates that officers in the vice unit received multiple complaints from a neighboring precinct that the club was selling liquor without a license, and the department verified that the club did not have a liquor license. The pat-down was conducted for the safety of the undercover officers. And, arguably, it was reasonable to suspect that the defendant guards would be armed given their duties and responsibilities.[2]

This case provides an opportunity to address this jurisprudentially significant question. It seems unlikely that we would hold that a brief detention and pat-down of a third party to facilitate an undercover operation is always prohibited. For example, we might hold that such activities are permitted so long as there was reasonable suspicion for the undercover operation itself. It might also be relevant whether the brief detention and pat-down was *necessary* to carry out the undercover operation or if other means could have been employed. Resolving this

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[2] For these reasons, the cases cited by the Court of Appeals majority appear to be distinguishable. The Court of Appeals majority first cited *Sibron v New York*, 392 US 40, 64 (1968), in which the United States Supreme Court held that a suspect merely speaking to known narcotics addicts over several hours did not give rise to an officer's subsequent *Terry* stop and pat-down given that the officer did not have "fear of life or limb" or other grounds to search the defendant for weapons. The Court of Appeals majority found that like in *Sibron*, the mere act of working security at an after-hours club under investigation did not provide reasonable suspicion for the detention and pat-down. But unlike the patrolman in *Sibron*, the officers in this case appear to have had reasonable suspicion of criminal activity by the club, and surely it was reasonable to believe that security guards at an after-hours club would be armed. The Court of Appeals majority also cited *Ybarra v Illinois*, 444 US 85, 92-94 (1979), in which the United States Supreme Court held that the police could not pat down a patron of a bar that the officers had a warrant to search where there was no suspicion that the patron was involved in the criminal activity or armed and dangerous. The Court of Appeals concluded that in this case there was no indication that defendants possessed weapons; "[t]hey were simply working at a place being investigated for selling liquor without a license." *McCloud* (opinion of the Court), unpub op at 5. But unlike the tavern patron in *Ybarra*, for whom "the police had no reason to believe he had any special connection with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband," *Summers*, 452 US at 695 n 4, the security guards here arguably had a connection to the premises through their employment, and the officers surely could reasonably suspect they were armed given their duties.

question would provide guidance to law enforcement officers engaged in difficult and dangerous undercover work. I would grant leave in this case to provide that guidance. The Court declines to do so, and therefore I dissent.

PEOPLE v ADAM KING, No. 163728; Court of Appeals No. 349601.

PEOPLE v PERREN, No. 164352; Court of Appeals No. 360495.

PEOPLE v AGAR, No. 164643; Court of Appeals No. 360520.

PEOPLE v URIBE, No. 164653; Court of Appeals No. 361993.

Leave to Appeal Denied August 24, 2022:

In re CASPER/WASHINGTON, No. 164592; Court of Appeals No. 359270.

Summary Disposition September 6, 2022:

FINN v WILLIAM BEAUMONT HOSPITAL, No. 163606; Court of Appeals No. 357637. On order of the Court, the application for leave to appeal the August 25, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the order of the Court of Appeals and we REMAND this case to that court for reconsideration in light of *Meyers v Rieck*, 509 Mich 460 (2022).

PEOPLE v EARLEY, No. 163665; Court of Appeals No. 357750. By order of March 17, 2022, the application for leave to appeal the August 25, 2021 order of the Court of Appeals was held in abeyance pending the decision in *People v Peeler* (Docket No. 163667). On order of the Court, the case having been decided on June 28, 2022, 509 Mich 381 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the June 16, 2021 order of the Genesee Circuit Court denying the defendant's motion to remand for a preliminary examination, for the reasons stated in *Peeler*, and we REMAND this case to the circuit court for further proceedings not inconsistent with *Peeler*.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for former Governor Rick Snyder.

PEOPLE v GERALD AMBROSE, No. 163673; Court of Appeals No. 357757. By order of March 17, 2022, the application for leave to appeal the August 25, 2021 order of the Court of Appeals was held in abeyance pending the decision in *People v Peeler* (Docket No. 163667). On order of the Court, the case having been decided on June 28, 2022, 509 Mich 381 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the June 16, 2021 order of the Genesee Circuit Court denying the defendant's motion to remand for a preliminary examination, for the

reasons stated in *Peeler*, and we REMAND this case to the circuit court for further proceedings not inconsistent with *Peeler*.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for former Governor Rick Snyder.

PEOPLE v TYLER, No. 163979; Court of Appeals No. 359066. By order of March 30, 2022, the application for leave to appeal the December 22, 2021 order of the Court of Appeals was held in abeyance pending the decisions in *People v Peeler* (Docket No. 163667) and *People v Lyon* (Docket No. 164191). On order of the Court, the cases having been decided on June 28, 2022, 509 Mich 381 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the October 4, 2021 order of the Genesee Circuit Court denying the defendant's motion to remand for a preliminary examination, for the reasons stated in *Peeler*, and we REMAND this case to the circuit court for further proceedings not inconsistent with *Peeler*.

PEOPLE v STAGGS, No. 164135; Court of Appeals No. 359507. By order of May 31, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the February 24, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v HILTON, No. 164224; Court of Appeals No. 359717. On order of the Court, the application for leave to appeal the February 16, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the December 7, 2021 order of the Genesee Circuit Court denying the defendant's motion to remand for a preliminary examination, for the reasons stated in *People v Peeler*, *People v Baird*, and *People v Lyon*, 509 Mich 381 (2022), and we REMAND this case to the circuit court for further proceedings not inconsistent with *Peeler*, *Baird*, and *Lyon*.

CARTER v MICHIGAN AMBULATORY SURGICAL CENTER, LLC, No. 164415; Court of Appeals No. 359381. On order of the Court, the application for leave to appeal the April 7, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *Linstrom v Trinity Health-Michigan* (Court of Appeals Docket No. 358487). After *Linstrom* is decided, the Court of Appeals shall reconsider this case in light of *Linstrom*.

PEOPLE v SWOFFER-SAULS, No. 164417; Court of Appeals No. 353827. On order of the Court, the application for leave to appeal the March 24, 2022 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration of the defendant's

argument that the imposition of lifetime registration as a sex offender violates the state prohibition on cruel or unusual punishment under Const 1963, art 1, § 16, or the federal prohibition on cruel and unusual punishment under US Const, Am VIII. This argument was raised by the defendant in the Court of Appeals but not decided by that court in its opinion. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Denied September 6, 2022:

In re BEARD, No. 162832; Court of Appeals No. 355073.

PEOPLE v MORRIS, No. 163635; Court of Appeals No. 351875.

PEOPLE v WILLIAM EDWARDS, No. 163987; Court of Appeals No. 351389.

POKERWINSKI v RIVERVIEW MEDICAL INVESTORS LIMITED PARTNERSHIP, No. 164024; Court of Appeals No. 354851.

HEATH v WILCOXON, No. 164044; Court of Appeals No. 358410.

FREEMAN v CHAMPS AUTO SALES, INC and FREEMAN v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Nos. 164118 and 164119; Court of Appeals Nos. 355589 and 355596.

PEOPLE v COLLEY, No. 164132; Court of Appeals No. 359186.

PEOPLE v WRIGHT, No. 164143; Court of Appeals No. 359799.

PEOPLE v MCMAHEN, No. 164168; Court of Appeals No. 358942.

PEOPLE v SAYLOR, No. 164196; Court of Appeals No. 351945.

PEOPLE v FLOWERS, No. 164197; Court of Appeals No. 353346.

VAN ANDA AVIATION, LLC v MANTURUK, No. 164211; Court of Appeals No. 351983.

MAXEY v BOTSFORD GENERAL HOSPITAL, No. 164239; Court of Appeals No. 353920.

PEOPLE v UNDERHILL, No. 164265; Court of Appeals No. 360097.

SWEETS OF BENGAL, INC v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 164335; Court of Appeals No. 358716.

CLAYTON v COUNTRY HOUSE APARTMENTS, LLC, No. 164383; Court of Appeals No. 355712.

PEOPLE v CURTIS, No. 164385; Court of Appeals No. 359102.

PEOPLE v MILLER, No. 164396; Court of Appeals No. 360556.

PEOPLE v LYON, No. 164410; Court of Appeals No. 360124.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for former Governor Rick Snyder.

PEOPLE v ELLER, No. 164418; Court of Appeals No. 353416.

PEOPLE v JAMES BRADLEY, No. 164419; Court of Appeals No. 355891.

PEOPLE v JOHN LEWIS, No. 164422; Court of Appeals No. 360221.

PEOPLE v UNDERWOOD, No. 164423; Court of Appeals No. 358774.

PEOPLE v DORTCH, No. 164426; Court of Appeals No. 354619.

PEOPLE v LUTZ, No. 164427; Court of Appeals No. 360557.

PEOPLE v HARBENSKI, No. 164428; Court of Appeals No. 356731.

PEOPLE v SWANK, No. 164429; Court of Appeals No. 359069.

PEOPLE v GREER, No. 164430; Court of Appeals No. 359882.

SATTLER v TARJEFT, Nos. 164433 and 164434; Court of Appeals Nos. 358163 and 358164.

PEOPLE v DEBRUYN, No. 164437; Court of Appeals No. 352274.

ZUG ISLAND FUELS COMPANY, LLC v DEPARTMENT OF TREASURY, No. 164440; Court of Appeals No. 356419.

ZAHRA, J., would grant leave to appeal.

PEOPLE v KOONCE, No. 164444; Court of Appeals No. 359702.

PEOPLE v PARRISH, No. 164448; Court of Appeals No. 356439.

PEOPLE v CROMER, No. 164451; Court of Appeals No. 360878.

DEFLIPPIS v REDFORD POLICE DEPARTMENT, No. 164455; Court of Appeals No. 356168.

In re ESTATE OF ELDON KNOBLOCK, No. 164476; Court of Appeals No. 356451.

In re BARBARA A YOUNG LIVING TRUST, No. 164477; Court of Appeals No. 355309.

PEOPLE v WARD, No. 164487; Court of Appeals No. 360583.

ZAWADA v HOGAN, No. 164496; Court of Appeals No. 355422.

PEOPLE v BECK, No. 164504; Court of Appeals No. 360325.

PEOPLE v BLUE, No. 164511; Court of Appeals No. 360811.

WILKINS v TIBBITTS, No. 164513; Court of Appeals No. 357138.

PEOPLE v SWARTHOUT, No. 164516; Court of Appeals No. 360430.

PEOPLE v CARRIER, No. 164527; Court of Appeals No. 360822.

PEOPLE v BUTLER, No. 164535; Court of Appeals No. 356457.

PEOPLE v HUNT, No. 164549; Court of Appeals No. 360725.

PEOPLE v MCMURTRIE, No. 164550; Court of Appeals No. 360374.

PEOPLE v SPARKS, No. 164559; Court of Appeals No. 360399.

PEOPLE v GILDNER, No. 164575; Court of Appeals No. 361456.

Leave to Appeal Before Decision by the Court of Appeals Denied September 6, 2022:

PEOPLE v ISHAK, No. 164533; Court of Appeals No. 361424.

Superintending Control Denied September 6, 2022:

SCHULTES v ATTORNEY GRIEVANCE COMMISSION, No. 164325.

JADIDNOURI v ATTORNEY GRIEVANCE COMMISSION, No. 164420.

Reconsideration Denied September 6, 2022:

PEOPLE v HOWELL, No. 163295; Court of Appeals No. 352535.

PEOPLE v KELSEY, Nos. 163509 and 163510; Court of Appeals Nos. 351719 and 354239.

GRIEVANCE ADMINISTRATOR v BAZZO, No. 164052.

PEOPLE v BOARD, No. 164112; Court of Appeals No. 352371.

Relief Denied September 7, 2022:

ANDERSON v BOARD OF STATE CANVASSERS, No. 164747. On order of the Court, the motions for immediate consideration, the motion to expedite, and the motion to intervene are GRANTED. The complaint for mandamus and declaratory relief is considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief.

VIVIANO, J. (*concurring*). Plaintiffs have raised various challenges to a constitutional amendment proposed by the Legislature under Const 1963, art 12, § 1. I agree with the Court's denial order because I believe plaintiffs' challenges fail. But I write because one of their arguments relates to an issue that has come before the Court before. Specifically, plaintiffs contend that an amendment proposed by the Legislature under Const 1963, art 2, § 1 must be limited to a single purpose and that the amendment here fails that test because it relates to two purposes, i.e., term limits and financial disclosures by legislators. The text of Const 1963, art 12, § 1, however, does not establish a single-purpose test:

> Amendments to this constitution may be proposed in the senate or house of representatives. Proposed amendments agreed to by two-thirds of the members elected to and serving in each house on a vote with the names and vote of those voting entered in the respective journals shall be submitted, not less than 60 days thereafter, to the electors at the next general election or special election as the legislature shall direct. If a majority of electors voting on a proposed amendment approve the same, it shall become part of the constitution and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved.

No express or implicit single-purpose requirement is evident in this language.

Plaintiffs might have presented a better argument if the amendment here was being proposed via an initiative petition. Those amendments are governed by Const 1963, art 12, § 2. In *Citizens Protecting Michigan's Constitution v Secretary of State*, we noted the possibility that § 2 prohibited amendments containing multiple purposes, but we did not decide the issue because the plaintiffs there had not made the argument.[1] I believe that a strong argument could be made that § 2 does, in fact, require that amendments proposed by initiative be limited to a single purpose. The relevant text provides:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.
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> Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions

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[1] *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 82 n 96 (2018). The dissent in *Citizens* did more fully address the issue and concluded that "[b]ecause 'the' is a definite article and 'purpose' is a singular noun, it seems reasonably clear that this phrase 'statement of the purpose of the proposed amendment' likely contemplates a single purpose." *Id*. at 120 (MARKMAN, C.J., dissenting).

> of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.
>
> The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

The first indication that this provision establishes a single-purpose limitation arises from the fact that a petition under § 2 can contain only a single amendment: "Every petition shall include the full text of the proposed amendment . . . ."[2] The reference to only a single amendment is meaningful, and it contrasts with the language in § 3 permitting constitutional conventions to propose and adopt multiple "amendments."[3] In other words, the Constitution differentiates between the number of amendments that can be proposed through the various procedures—a petition can contain one amendment, while a convention can offer multiple amendments. Arguably, a restriction to a single amendment could not be honored if the single amendment contained changes that were the equivalent of multiple amendments.[4]

Other language in § 2 strongly suggests that the single amendment allowed in an initiative petition must be limited to a single purpose. This limitation most directly appears to follow from the requirement that a ballot containing a petition-initiated amendment "shall contain a statement of *the* purpose of the proposed amendment, expressed in not more than 100 words," which "shall consist of a true and impartial statement of *the* purpose of the amendment in such language as shall create no

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[2] Const 1963, art 12, § 2; see *id*. ("Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed . . . .").

[3] Const 1963, art 12, § 3 ("Any proposed constitution or *amendments* adopted by such convention . . . .") (emphasis added); *id*. ("Upon the approval of such constitution or *amendments* by a majority of the qualified electors voting thereon the constitution or *amendments* shall take effect as provided by the convention.").

[4] Cf. *Amador Valley Joint Union High Sch Dist v State Bd of Equalization*, 22 Cal 3d 208, 223 (1978) ("[A]n enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by deletion or alteration of numerous existing provisions may well constitute a revision thereof.").

prejudice for or against the proposed amendment."[5] Indeed, the text refers to only one purpose—"*the* purpose"—multiple times and requires that this purpose be expressible in relatively few words.[6] This requirement of expressing "the purpose" could not be satisfied if the proposed amendment had multifarious purposes.[7] Such reasoning properly provided the basis for the Court of Appeals' upholding the limited and focused initiative in *Protect Our Jobs v Bd of State Canvassers*.[8]

It remains possible that even if the amendment is limited to a single "purpose," that "purpose" may be broadly defined by the general end or objective of the amendment, such that the amendment contains various provisions all geared to effectuate the overriding purpose. It has been observed that " '[t]he word "amendment" is clearly susceptible to a

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[5] Const 1963, art 12, § 2 (emphasis added).

[6] Const 1963, art 12, § 2 (emphasis added). In addition, the 1908 Address to the People referred to "the language, scope and purpose of the proposed amendment," "the immediate purpose intended" by an amendment, and "the purpose and terms, as well as the legal effect, of such amendments . . . ." 2 Official Record, Constitutional Convention 1907–1908, pp 1590-1591. Thus, the textual indications that an amendment is limited to a single purpose are consistent with the way in which "the purpose" was referred to in the Address.

[7] In past cases, however, we have suggested that an amendment by petition could have multiple purposes. In *City of Jackson v Comm'r of Revenue*, 316 Mich 694, 710-711 (1947), we summarily rejected the argument that an amendment was void because it contained more than one purpose. Instead of looking to the text of the Constitution—or even examining whether the amendment truly contained multiple purposes—we merely declared that "[w]e [found] no defects in the petitions or in the manner of submitting the proposed amendment . . . ." *Id*. at 711. Instead, we observed that the voters had already passed the amendment and we expressed hesitance to rule in a manner that would nullify that vote. *Id*. This holding reflects the fact that once the people have adopted an amendment, a "postelection challenge[r] bear[s] a heavy burden of persuasion." *Massey v Secretary of State*, 457 Mich 410, 415 (1998). Similarly, in *Graham v Miller*, 348 Mich 684, 692 (1957), we simply cited *Jackson*, without any meaningful independent analysis, for the proposition that amendments could contain several purposes. And, in any case, that discussion was dictum, as we concluded that the amendment included only one overarching purpose. *Id*. Thus, our caselaw has not satisfactorily addressed this issue.

[8] *Protect Our Jobs v Bd of State Canvassers*, unpublished per curiam opinion of the Court of Appeals, issued August 27, 2012 (Docket No. 311828), pp 2-3 (noting that the ballot proposal was "limited to a single subject matter" and made two related changes to the Constitution).

construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject.' "[9]

We have a well-developed body of caselaw addressing nearly the identical issue—how to frame the "purpose" of a law—in our Constitution's Title-Object Clause, which provides in relevant part that "[n]o law shall embrace more than one object . . . ."[10] We have defined a law's object "as its general purpose or aim."[11] Our caselaw has explained that:

> The "one object" provision must be construed reasonably, not in so narrow or technical a manner that the legislative intent is frustrated. *Kuhn v Dep't of Treasury*, 384 Mich 378, 387-388, 183 NW2d 796 (1971). We should not invalidate legislation simply because it contains more than one means of attaining its primary object; "[h]owever, if the act contains 'subjects diverse in their nature, and having no necessary connection,' " it violates the Title-Object Clause. [*City of Livonia v Dep't of Social Servs*, 423 Mich 466, 499 (1985)]. The act may include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object. [*Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 411, 465 (1973)]. The statute "may authorize the doing of all things which are in furtherance of the general purpose of the Act without violating the 'one object' limitation of art 4, § 24." *Kuhn*, [384 Mich at 388].[12]

These standards provide a possible framework for determining whether a proposed amendment under Const 1963, art 12, § 2 has a single purpose. The test is not rigid, and the purpose can be broadly conceived[13]—but not so broadly that it requires a reexamination of our entire Constitution. It must be narrow enough that it can be defined, in

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[9] *People v Stimer*, 248 Mich 272, 277 (1929) (POTTER, J., dissenting), quoting *State ex rel Corry v Cooney*, 70 Mont 355, 362 (1924).

[10] Const 1963, art 4, § 24.

[11] *Pohutski v City of Allen Park*, 465 Mich 675, 691 (2002).

[12] *Id*.

[13] For example, in *Graham*, 348 Mich at 692, the proposal provided for distribution of sales tax proceeds to school districts and local governments and also provided an annual legislative grant to school districts. We found "the amendment in question to be in furtherance of but 1 purpose, namely, enabling school districts to finance the building of schools without placing oppressive burdens on taxpayers in any 1 year . . . ." *Id*. In a related context, we found that despite transferring to the Department of Agriculture various powers and duties from other agencies, the law that did so had but one object—"to promote the agricultural interests of the State[.]" *Stimer*, 248 Mich at 277.

contrast to an undefined purpose of, say, reexamining the entire Constitution.[14] Further, a court's determination of the amendment's purpose must arise from its examination of the text, not the intentions of the drafters or the individuals proposing the amendment.[15] It requires, in other words, a "fair reading" of the text.[16]

In an appropriate future case, I would consider whether Const 1963, art 12, § 2 limits initiative amendments to a single purpose. But none of the textual indications supporting such an interpretation in § 2 is present in § 1, which is at issue in this case. Although a single-purpose limitation in § 1 might prove salutary, the courts cannot fashion such a limitation, only the people can through ratification of an amendment to that end.[17] For these reasons, I concur in the denial.

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[14] Jameson, A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding (1887), § 574c, p 612 ("In other words, the legislative mode [i.e., amendments initiated by the legislature] is confined to a narrow and defined purpose, and that by Conventions to a broader and more general and undefined purpose, embracing within its scope the former, and possibly much more.").

[15] Cf. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West 2012), p 20 ("[T]he textualist routinely takes purpose into account, but in its concrete manifestations as deduced from close reading of the text.").

[16] *Id*. at 33 ("[The] 'fair reading' " interpretive approach "requires an ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context.").

[17] A single-subject requirement serves to prevent, among other things, "logrolling," which occurs when proposals are packaged together to ensure that there are enough votes to secure passage of an otherwise unpopular policy. See *Advisory Opinion to the Attorney General*, 132 So 3d 786, 795 (Fla, 2014); cf. *Yute Air Alaska, Inc v McAlpine*, 698 P2d 1173, 1184-1185 (Alas, 1985) (Moore, J., dissenting) ("Whenever a bill becomes law through the initiative process, all of the problems that the single-subject rule was enacted to prevent are exacerbated. There is a greater danger of logrolling, or the deliberate intermingling of issues to increase the likelihood of an initiative's passage, and there is a greater opportunity for 'inadvertence, stealth and fraud' in the enactment-by-initiative process. The drafters of an initiative operate independently of any structured or supervised process. They often emphasize particular provisions of their proposition, while remaining silent on other (more complex or less appealing) provisions, when communicating to the public. Indeed, initiative promoters typically use simplistic advertising

Relief Granted September 8, 2022:

PROMOTE THE VOTE 2022 v BOARD OF STATE CANVASSERS, No. 164755. On order of the Court, the motions for immediate consideration, to intervene, to file a reply, and of Voters Not Politicians to file a brief amicus curiae are GRANTED. The complaint for mandamus and declaratory relief is considered, and relief is GRANTED. We direct the Board of State Canvassers (the Board) to certify the Promote the Vote petition as sufficient for placement on the November 8 general election ballot by September 9, 2022.

The Board's duty with respect to petitions is "limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012) (opinion by MARY BETH KELLY, J.). It is undisputed that there are sufficient signatures to warrant certification. The only challenge to the petition was that it failed to include all the constitutional provisions that would be abrogated by the proposed amendments, as is required by Const 1963, art 12, § 2 and MCL 168.482. See *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763 (2012). We disagree. Instead, we conclude that the proposed amendments would not abrogate any of the constitutional provisions identified by the challenger. The Board thus has a clear legal duty to certify the petition.

We further direct the Secretary of State (Secretary) to include the ballot statement for the Promote the Vote proposal drafted by the Director of Elections and approved by the Board when the Secretary certifies to county clerks the contents of the ballot for the November 8, 2022 general election.

MCCORMACK, C.J. (*concurring*). I agree with the Court's decision to grant the complaint for mandamus and declaratory relief and order the Board of State Canvassers (the Board) to certify the Promote the Vote petition for the ballot. I write separately to address one issue that ought to be clear but apparently isn't—the Board's role in certifying petitions is very limited. The Board's duty is to determine whether a petition has sufficient signatures and whether its form complies with statutory requirements.[1]

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to present their initiative to potential petition-signers and eventual voters. Many voters will never read the full text of the initiative before the election.").

[1] While in *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012) (opinion by MARY BETH KELLY, J.), the lead opinion stated that "[t]he board's duty with respect to referendum petitions is limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification," the statutes cited for that proposition address only the Board's authority to approve the "form" and "sufficiency" of the petition. See *id*. at 601 n 23, 618 n 58 (citing various statutes). The statutes do not explicitly authorize the

There is no dispute about the signatures or form of this petition. Rather, the challengers believe that the petition violates Article 12, § 2 of the Michigan Constitution because its *substance* abrogates various provisions of the Constitution without publishing those provisions. This quintessential legal question is far outside the Board's legal role (and expertise). See, e.g., *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 776-784 (2012) (determining the meaning of "alter" and "abrogate" in Article 12, § 2).

The challengers have a forum in which to have this objection addressed: court. See MCL 600.4401(1); MCR 7.203(C)(2).

Absent an insufficient number of signatures or a petition form that doesn't comply with unambiguous statutory requirements, the Board lacks the authority to refuse to certify a petition. Because the challenger here alleged neither of those defects, the Board had a duty to certify the petition. See *Reproductive Freedom for All v Bd of State Canvassers*, 510 Mich 894 (2022); *Mich Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 520 (2005) ("Because there is no dispute that the form of the petition is proper or that there are sufficient signatures, we conclude that the board is obligated to certify the petition, and thus, breached its clear legal duty to certify the petition."). The Board's failure to do so seems to be disappointing evidence of the weakened state of our polity.

BERNSTEIN, J. (*concurring*). I acknowledge, as I must, that mandamus is an extraordinary remedy. I vote to grant mandamus relief today because of my consistent belief in the importance of elections in our representative democracy.[1] Throughout the years, I have voted to grant relief in a number of election cases. *Rocha v Secretary of State*, 509 Mich 1025, 1026-1028 (2022) (VIVIANO, J., dissenting) (joining Justice VIVIANO's dissenting statement that would grant the plaintiff's request for mandamus relief to be placed on the August 2022 primary ballot); *Raise the Wage MI v Bd of State Canvassers*, 509 Mich 876, 877 (2022) (BERNSTEIN, J., concurring in part and dissenting in part) ("I believe it is clear that a union label on an initiative petition is not subject to type-size requirements as set forth in MCL 168.482."); *Attorney General v Bd of State Canvassers*, 500

Board to make determinations about the "content" of the petition. So I question whether that statement from *Stand Up for Democracy* is correct. See *Reproductive Freedom for All v Bd of State Canvassers*, 510 Mich 894, 895 n 1 (2022) (MCCORMACK, C.J., concurring).

[1] " 'A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.' " *Attorney General v Bd of State Canvassers*, 500 Mich 907, 916 n 3 (2016) (BERNSTEIN, J., dissenting), quoting Hamilton, *Second Letter from Phocion* (April 1784), as published in *The Papers of Alexander Hamilton Volume III: 1782–1786*, Syrett & Cooke, eds (New York: Columbia University Press, 1962), pp 544-545.

Mich 907, 914 (2016) (BERNSTEIN, J., dissenting) ("I would reverse the Court of Appeals rather than order expedited oral argument, as I believe that the Court of Appeals clearly erred. I write to further explain why I believe that appellant Jill Stein has met the statutory requirements for a recount.").[2] In numerous other cases where the legal issue before us was less clear-cut, I have voted for either further consideration or oral argument, given my strong interest in making sure we get these cases right. See *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1021 (2022) (BERNSTEIN, J., dissenting) ("Because I believe this case presents significant legal issues worth further consideration, I would order full briefing in this case and hold oral argument next week to ensure that the interests of Michigan voters are fully considered."); *Markey v Secretary of State*, 509 Mich 1021, 1021 (2022) (would have ordered oral argument); *Craig v Bd of State Canvassers*, 509 Mich 1021, 1021 (2022) (would have granted the bypass and ordered oral argument); *Cavanagh v Bd of State Canvassers*, 509 Mich 1028, 1028 (2022) (would have ordered oral argument); *Davis v Highland Park City Clerk*, 509 Mich 1029, 1029-1030 (2022) (WELCH, J., dissenting) (joining Justice WELCH's dissenting statement that would have found the legal issues worthy of further consideration); *League of Women Voters of Mich v Secretary of State*, 506 Mich 886, 887-888 (2020) (BERNSTEIN, J., dissenting) ("Because absentee ballots will undoubtedly play a significant role in the upcoming general election, I would hold oral argument in this case ahead of that election in order to ensure that the interests of Michigan voters are thoroughly examined and considered before votes are tallied, in order to avoid any potential disruption to the election process. The people of Michigan deserve nothing less."). I believe that my long-expressed interest in letting the people of Michigan make their own decisions at the ballot box speaks for itself. Accordingly, I join this Court's decision to grant mandamus relief.

WELCH, J. (*concurring*). I write separately to explain why I voted in favor of ordering the Board of State Canvassers (the Board) to certify the Promote the Vote petition. The Board's duty with respect to petitions is " 'limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification.' " *Unlock Mich v Bd of State Canvassers*, 507 Mich 1015, 1015 (2021), quoting *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012) (opinion by MARY BETH KELLY, J.). The Board preliminarily approved the form and content of the petition prior to circulation in February 2022, and that preliminary approval was not challenged in court. It is undisputed that there are sufficient signatures to warrant certification. In a postcirculation challenge to the petition before the

[2] My vote in this case is consistent with my vote and my separate statement in *Reproductive Freedom for All v Bd of State Canvassers*, 510 Mich 894, 896-897 (2022) (BERNSTEIN, J., concurring).

Board, as well as before this Court, Defend Your Vote argued that the petition would abrogate Const 1963, art 2, §§ 2, 5, and 9; Const 1963, art 6, § 5; and Const 1963, art 7, § 8, and that the petition failed to republish these provisions as required by Const 1963, art 12, § 2 and MCL 168.482. Therefore, according to Defend Your Vote, the Board has a clear legal duty to withhold certification of the petition. I disagree. The proposed amendments will not abrogate any of the constitutional provisions identified by the challenger explicitly or by implication.[1]

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[1] While the Court does not decide the issue today, like Chief Justice MCCORMACK, I question whether the Board has legal authority to consider and resolve republication challenges as a part of its duty to review the form of the petition under the Michigan Election Law, MCL 168.1 *et seq*. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 585 (2018) ("The Board's duty is to certify the proposal after determining whether the form of the petition substantially complies with statutory requirements and whether the proposal has sufficient signatures in support."). In *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 778 (2012), this Court held that "petition supporters must fully comply with the requirement that the petition republish any existing constitutional provision that the proposed amendment, if adopted, would alter or abrogate." See also Const 1963, art 12, § 2; MCL 168.482(3). But while this Court's authority to resolve legal disputes concerning alleged republication defects is clear, the scope of the Board's authority to withhold certification because of an alleged republication defect is debatable. Const 1963, art 12, § 2 contains a republication requirement, but it does not mention the Board, and Const 1963, art 12, § 2 describes the role of the "person authorized by law" to receive a petition proposing a constitutional amendment but does not mention the republication requirement. While MCL 168.482(3) provides that republication of existing provisions of the Constitution that the proposal would "alter or abrogate" is required, MCL 168.476(1) merely provides that "[u]pon receiving notification of the filing of the petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." Moreover, our caselaw demonstrates, and the parties concede, that whether a proposed amendment would abrogate an existing constitutional provision frequently requires legal analysis and often will not be readily apparent from the face of a petition. I acknowledge that in *Stand Up for Democracy v Secretary of State*, 492 Mich 588 (2012), and in some other decisions cited by Justice ZAHRA, the Court has suggested that the Board has some authority to review the *content* of a petition. But as the Chief Justice points out, the statutory and constitutional authority for these statements is questionable.

"[A]n amendment only abrogates an existing provision when it renders that provision wholly inoperative." *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 773 (2012). "An existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together." *Id*. at 783 (citation omitted). "Because any amendment might have an effect on existing provisions, the 'abrogation' standard makes clear that republication is only triggered by a change that would essentially eviscerate an existing provision." *Id*. at 782. "[W]hen the existing provision would likely continue to exist as it did preamendment, although it might be affected or supplemented in some fashion by the proposed amendment, no abrogation occurs." *Id*. at 783. "On the other hand, a proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement." *Id*. The amendments proposed by the Promote the Vote petition can be harmonized with existing constitutional provisions, and thus, the proposed amendments do not abrogate Const 1963, art 2, §§ 2, 5, and 9; Const 1963, art 6, § 5; or Const 1963, art 7, § 8.

The proposed amendments' requirement that in-person voting be permitted nine days before election day and that results not be generated or released before 8:00 p.m. on election day would not render Const 1963, art 2, § 5 inoperative. Election day would remain the first Tuesday after the first Monday in November, and election results would not be released until after the close of the polls on election day. The expansion of early in-person voting days in Michigan has no more of an effect on the Election Day Clause than the preexisting practice of early voting by mail. See Const 1963, art 2, § 4. Accordingly, the proposed and existing constitutional provisions can be harmonized.

The proposed amendments would also create an explicit right to vote held by persons who are "elector[s] qualified to vote in Michigan," and it would prohibit the enactment or enforcement of laws that have the "intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." (Capitalization altered.) The proposed amendments will limit the substance of statutory laws that can be proposed and adopted by the people pursuant to Const 1963, art 2, § 9 as well as local laws that can be enacted by the governing bodies of counties under Const 1963, art 7, § 8. But the ability to propose or enact laws through those constitutional mechanisms would continue to exist and operate as it did preamendment.[2] Likewise, the proposed

[2] Const 1963, art 2, § 9 currently states that "[t]he power of initiative extends only to laws which the legislature may enact under this constitution." In other words, any constitutional limitations imposed on the Legislature's lawmaking authority automatically apply to the initiative power. The self-executing language in Article 2, § 9 provides a

amendments' creation of a cause of action for the violation of the right to vote that must be filed in the circuit court of the county in which a plaintiff resides will affect some aspects of this Court's rulemaking authority, but the Court would retain its authority to establish rules of practice and procedure for the courts under Const 1963, art 6, § 5.

The final abrogation challenge concerns Const 1963, art 2, § 2, which provides that "[t]he legislature may by law exclude people from voting because of mental incompetence or commitment to a jail or penal institution." The proposed amendments would explicitly enshrine certain voting rights that will be held by "[e]very citizen of the Unites States who is an elector qualified to vote in Michigan," and these rights would be created by adding new subsections to Const 1963, art 2, § 4. Under Const 1963, art 2, § 1, "[e]very citizen of the United States who has attained the age of 21 years,[3] who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election *except as otherwise provided in this constitution*." (Emphasis added.) Thus, Article 2, § 1 expressly acknowledges that who is qualified to be an elector in Michigan can be limited by other provisions of the Constitution, and Article 2, § 2 expressly grants the Legislature permissive authority to enact statutes imposing such limitations as to mentally incompetent or incarcerated individuals.[4] Nothing about that authority has changed with the proposed amendments. While the proposed amendments of Article 2, § 4(1)(a) might affect the manner in which the Legislature may exercise the permissive authority granted by Article 2, § 2, it does not implicitly or explicitly forbid the Legislature from enacting a statute under the authority expressly granted to it by Article 2, § 2. The existing and proposed constitutional provisions can exist and operate in harmony, and thus no abrogation will occur.[5]

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built-in mechanism to harmonize this part of the Constitution with any new lawmaking limitations that the proposed amendments would impose on the Legislature. Relevant to this case, the Promote the Vote petition republished Article 4, § 1, thus acknowledging the proposed new limitations on the Legislature's lawmaking authority.

[3] But see US Const, Am XXVI, § 1, which provides, "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

[4] This is the only constitutional language that gives the Legislature its current authority to exclude incarcerated individuals from the ballot box, as it has done through MCL 168.492a. Otherwise, such an action would likely be an unconstitutional imposition of additional qualifications on who can vote that go beyond what is permitted under Const 1963, art 2, § 1.

[5] While existing statutes that were previously enacted pursuant to Article 2, § 2 might require modification to remain constitutionally

The proposed constitutional amendments will not, if adopted, abrogate any existing constitutional provisions that the challenger claims should have been republished. Therefore, the Board has a clear legal duty to certify the petition for presentation to the electorate.

I respectfully concur in the Court's judgment.

ZAHRA, J. (*dissenting*). I dissent from the conclusion of the majority order that the Board of State Canvassers has a clear legal duty to certify the petition for presentation to the electorate. The constitutional amendment proposed by plaintiff seeks to amend the Michigan Constitution to expressly prohibit the Legislature from enacting a law that would deny qualified electors the fundamental right to vote[1]. Const 1963, art 2, § 1 sets forth four criteria that must be satisfied for a person to be a qualified "elector,"[2] "except as otherwise provided in [the Michigan] constitution."[3] Article 2, § 2 provides otherwise; it states that "[t]he legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution." In other words, that provision allows the Legislature to exclude certain individuals from voting even if they meet the eligibility criteria for being an "elector" set forth in Const 1963, art 2, § 1.[4]

The proposed amendment of Article 2, § 4 provides that qualified electors in Michigan, i.e., individuals who meet the eligibility criteria in Article 2, § 1, shall have certain rights, including the "fundamental right to vote." It expressly provides[5] that:

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enforceable if voters approve the amendments set forth in the petition, this consideration is irrelevant to the abrogation analysis.

[1] See Proposed Amendment, art 2, § 4(1)(a).

[2] By "qualified elector," I mean a person who is "an elector and qualified to vote in any election." Const 1963, art 2, § 1; see also MCL 168.10 ("[T]he term 'qualified elector', as used in this act, means a person who possesses the qualifications of an elector as prescribed in section 1 of article II of the state constitution of 1963 and who has resided in the city or township 30 days.").

[3] A person must: (1) be a citizen of the United States, (2) be at least 18 years of age, (3) have resided in Michigan six months, and (4) meet the requirements of local residence provided by law. Const 1963, art 2, § 1; US Const, Am XXVI, § 1.

[4] It is worth noting that the Legislature has enacted a law providing that a person who has been convicted and sentenced to a term of incarceration "shall not vote, offer to vote, attempt to vote, or be permitted to vote at an election while confined." MCL 168.758b. See also MCL 168.492a ("An individual who is confined in a jail after being convicted and sentenced is not eligible to register to vote.").

[5] Proposed additions to the Constitution are capitalized; proposed deletions are stricken.

> THE FUNDAMENTAL RIGHT TO VOTE, INCLUDING BUT NOT LIMITED TO ~~T~~the right, once registered, to vote a secret ballot in all elections. NO PERSON SHALL: (1) ENACT OR USE ANY LAW, RULE, REGULATION, QUALIFICATION, PREREQUISITE, STANDARD, PRACTICE, OR PROCEDURE; (2) ENGAGE IN ANY HARASSING, THREATENING, OR INTIMIDATING CONDUCT; OR (3) USE ANY MEANS WHATSOEVER, ANY OF WHICH HAS THE INTENT OR EFFECT OF DENYING, ABRIDGING, INTERFERING WITH, OR UNREASONABLY BURDENING THE FUNDAMENTAL RIGHT TO VOTE.[6]

The challengers assert that this latter provision conflicts with Article 2, § 2's grant of authority to exclude persons from voting because of mental incompetence or incarceration. Further, challengers highlight that Article 12, § 2 of Michigan's Constitution requires that proposed amendments, like in this case, state the "existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law." "The purpose of the provision is to definitely advise the elector as to the purpose of the proposed amendment and what provision of the constitutional law it modified or supplanted."[7] Accordingly, the challengers reason that because the proposed amendment of Article 2, § 4 conflicts with Article 2, § 2's grant of authority, and because Article 2, § 2 was not published in the petition, the Board of State Canvassers properly declined to certify the petition for presentation to the electorate.[8]

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[6] It is hard to imagine a more expansive prohibition: "person" is defined very broadly; the prohibitions are stated very expansively; both intended and unintended effects are covered by the prohibition; and the impact on the right can be minimal (i.e., the right cannot be "INTERFER[ED] WITH, OR UNREASONABLY BURDEN[ED]").

[7] *Massey v Secretary of State*, 457 Mich 410, 417 (1998) (quotation marks and citation omitted).

[8] Chief Justice MCCORMACK asserts that "[t]he Board's duty is to determine whether a petition has sufficient signatures and whether its form complies with statutory requirements" and questions the Court's decision in *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012) (opinion by MARY BETH KELLY, J.), in which the lead opinion stated that "[t]he board's duty with respect to referendum petitions is limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." However, the Chief Justice is mistaken and conveniently ignores additional caselaw in which the Court has considered abrogation, i.e., the content of a petition. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42 (2018); *Protect Our Jobs v Bd of State*

In response, plaintiff argues that since only qualified electors have the fundamental right to vote, enactment of a law excluding certain persons from voting simply means that "such persons would not be qualified to vote in Michigan," and thus, "they would not be entitled to 'the fundamental right to vote.' " The flaws in this argument are apparent. It is hard to think of a more wholesale deprivation of a right than excluding a person from the class of persons entitled to claim that right in the first place. It would be quite a stretch to conclude that the Legislature can enact a law that strips a person of the status needed to exercise a right without "DENYING, ABRIDGING, [or] INTERFERING WITH" that right.[9] Simply stated, while Article 2, § 2 allows the Legislature to exclude certain qualified electors from voting, the proposed constitutional amendment would prohibit the Legislature from doing just that. These two provisions simply cannot be read harmoniously. The adoption of proposed Article 2, § 4(1)(a) would render Article 2, § 2 wholly inoperative. Accordingly, the text of Article 2, § 2 was required to be published in plaintiff's petition.

Article 2, § 1, which provides, "Every citizen of the United States who has attained the age of [majority], who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election *except as otherwise provided in this constitution*," does not save plaintiff's claim. (Emphasis added.) If the proposed amendment is adopted, the Constitution would both provide that the Legislature may prohibit prisoners and those who are mentally incompetent from voting and that the Legislature may not enact any "QUALIFICATION" that "HAS THE INTENT OR EFFECT OF DENYING, ABRIDGING, INTERFERING WITH, OR UNREASONABLY BURDENING THE FUNDAMENTAL RIGHT TO VOTE." In other words, the Constitution would contain inconsistent provisions, meaning the proposed constitutional amendment would render the existing constitutional provision, Article 2, § 2, wholly inoperable.

Further, preapproval of the petition by the Board of State Canvassers does not bar a challenge to the form or content of plaintiff's petition at this stage of the process. In *Protect Our Jobs v Bd of State Canvassers*,[10] the challenged petition forms were also preapproved, challenges were made to the form and content of the petitions after

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Canvassers, 492 Mich 763 (2012); *Mich Alliance for Prosperity v Bd of State Canvassers*, 492 Mich 763 (2012); *Citizens for More Mich Jobs v Secretary of State*, 492 Mich 763 (2012); *The People Should Decide v Bd of State Canvassers*, 492 Mich 763 (2012).

[9] Indeed, one can glean from the enacted text of the laws referenced in note 12 of this statement that the Legislature passed them with the intent of depriving certain incarcerated persons of the right to vote. Thus, the laws would appear to violate the intent element of the prohibition in the proposed amendment as well.

[10] *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763 (2012).

signatures were collected and submitted for approval and the Board of State Canvassers deadlocked regarding certification. This Court reviewed the substantive challenges and refused to issue a mandamus order with regard to one proposed constitutional amendment that would have abrogated another provision of the Constitution. In other words, the fact that the petitions were preapproved by the Board did not prevent this Court from later (after signatures were collected) addressing whether the petition forms violated the abrogation provision. Our order in *Unlock Mich v Bd of State Canvassers*,[11] simply does not support the notion that the Board of State Canvassers' approval of a petition bars legal challenges made after signatures have been collected. The predominant challenge in that case did not involve the petition's form. Instead, the predominant argument was that the signature-gathering process was riddled with fraud. This Court noted that the Board of State Canvassers had approved the form, the Bureau of Elections had determined that there were sufficient valid signatures, and Board of State Canvassers had rejected a motion to investigate the collection of the signatures, and thus the Board of State Canvassers had a duty to certify the petition.[12]

Finally, I renew my call to the Legislature to amend our state election laws to provide more time between the certification of candidates and policy questions to be placed on the general election ballot and the date by which the ballot must be finalized and sent for production. As I stated in *Johnson v Bd of State Canvassers*:

> Election-law cases have very concrete deadlines that are necessary to facilitate the printing and distribution of ballots. The current process provides very little time between decisions of the Board of State Canvassers and the date ballots must be finalized for printing. In the present case, there were only eight days between the vote of the Board of State Canvassers and the date a disposition was needed from this Court. These cases can present substantial and complex questions of law, which generally require extensive briefing and cannot properly be resolved in a matter of

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[11] *Unlock Mich v Bd of State Canvassers*, 507 Mich 1015 (2021).

[12] *Id*. Although some challenges regarding the form were made, after the Board of State Canvassers preapproved the form and content of the petition, the challenger immediately sued the Board of State Canvassers, asserting that the Board of State Canvassers should not have approved the form and substance of Unlock Michigan's petition. The Court of Appeals dismissed that complaint, and this Court denied the subsequent application for leave to appeal. *Keep Mich Safe v Bd of State Canvassers*, unpublished order of the Court of Appeals, entered August 17, 2020 (Docket No. 354188), lv den 506 Mich 915 (2020). In the instant case, nobody filed an action after the Board preapproved plaintiff's petition, and thus this is the first opportunity this Court has had to review the form of plaintiff's petition.

> days. . . . The people of Michigan deserve thoughtful, cogent, and well-reasoned decisions from this Court. The Legislature should amend the Michigan Election Law[13] to ensure that the judicial system has ample time to meaningfully review such matters, which are vitally important to the people of Michigan.[14]

This year is not an anomaly. In the past decade, the people of Michigan have increasingly exercised their right to direct democracy through proposals to enact legislation and amend our Constitution. With each such proposal there are unique and complex legal challenges that require in-depth development and thoughtful review by this Court. Legislation to provide this Court at least six weeks between the certification of the ballot by the Board of State Canvassers and the date by which the ballot must be finalized should be enacted before the 2024 primary and general elections.

Because Article 2, § 2 would be abrogated by the proposed amendment and it was not republished in the petition, plaintiff's proposal cannot be placed on the ballot as a matter of law. Because the Board of State Canvassers does not have a clear legal duty to certify the proposal for the ballot, plaintiff is not entitled to mandamus relief. Accordingly, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

REPRODUCTIVE FREEDOM FOR ALL v BOARD OF STATE CANVASSERS, No. 164760. On order of the Court, the motions for immediate consideration, to expedite, to intervene, for leave to file omnibus response, and to file briefs amicus curiae are GRANTED. The complaint for mandamus relief is considered, and relief is GRANTED. We direct the Board of State Canvassers (the Board) to certify the Reproductive Freedom For All (RFFA) petition as sufficient for placement on the November 8 general election ballot by September 9, 2022.

The Board's duty with respect to petitions is "limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012) (opinion by MARY BETH KELLY, J.). It is undisputed that there are sufficient signatures to warrant certification. The only challenge to the petition is in regard to whether there is sufficient space between certain words of the text of the proposed amendment. MCL 168.482(3) requires only that "[t]he full text of the amendment so proposed must follow the summary and be printed in 8-point type." The "full text" of the amendment is present: regardless of the existence or extent of the spacing, all of the words remain and they remain in the same order, and it is not disputed that they are printed in 8-point type. In this case, the meaning of the words has not changed by the alleged insufficient spacing between

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[13] MCL 168.1 *et seq*.

[14] *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1016-1017 (2022) (ZAHRA, J., concurring).

them. Assuming that the challengers' objection to the spacing represents a challenge to the "form" of the petition that the Board properly considered, the petition has fulfilled all statutory form requirements, and the Board thus has a clear legal duty to certify the petition.

We further direct the Secretary of State (Secretary) to include the ballot statement for the RFFA proposal drafted by the Director of Elections and approved by the Board when the Secretary certifies to county clerks the contents of the ballot for the November 8, 2022 general election.

MCCORMACK, C.J. (*concurring*). I concur with the order granting mandamus and ordering that the Board of State Canvassers certify the petition at issue for the ballot. The statute governing the form of the petition is designed to ensure that anyone signing a petition understands what they are signing.[1] That's why MCL 168.482 requires that a petition state, in 14-point boldface type, whether it is an "INITIATIVE PETITION AMENDMENT TO THE CONSTITUTION," or "INITIATION OF LEGISLATION," or "REFERENDUM OF LEGISLATION PROPOSED BY INITIATIVE PETITION." And it is why the statute requires a summary of not more than 100 words of the proposed amendment or question proposed. And it is also why the type size for the summary (12 point) and the full text (8 point) of the amendment are specified; smaller than 8-point type would be difficult for many to read. Each requirement promotes transparency and comprehension. None is designed to be an obstacle without a purpose.

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[1] While I accept the assumption in the Court's order that the challengers' argument is arguably a challenge to the "form and content" of the petition, I believe there is good reason to question whether this is the appropriate standard, and if so whether the challengers' argument is truly such a challenge. First, although in *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012) (opinion by MARY BETH KELLY, J.), the lead opinion stated that "[t]he board's duty with respect to referendum petitions is limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification," the statutes cited for that proposition address only the board's authority to approve the "form" and "sufficiency" of the petition. See *id*. at 601 n 23, 618 n 58 (citing various statutes). The statutes do not explicitly authorize the board to make determinations about the "content" of the petition. Second, assuming that the board is statutorily authorized to make judgments about the "content" of a petition, I question how that authority can be reconciled with the idea that the board acts in a ministerial capacity and lacks discretionary authority to adjudicate legal disputes. See *McQuade v Furgason*, 91 Mich 438, 440 (1892) (describing canvassing boards' duties as "purely ministerial and clerical").

Including the full text of the proposal serves that goal too: any signer curious after reading the summary can read the "full text" to be very confident about what exactly they are signing.

Seven hundred fifty three thousand and seven hundred fifty nine Michiganders signed this proposal—more than have ever signed any proposal in Michigan's history. The challengers have not produced a single signer who claims to have been confused by the limited-spacing sections in the full text portion of the proposal. Yet two members of the Board of State Canvassers would prevent the people of Michigan from voting on the proposal because they believe that the decreased spacing makes the text no longer "[t]he full text." That is, even though there is no dispute that every word appears and appears legibly and in the correct order, and there is no evidence that anyone was confused about the text, two members of the Board of State Canvassers with the power to do so would keep the petition from the voters for what they purport to be a technical violation of the statute. They would disenfranchise millions of Michiganders not because they believe the many thousands of Michiganders who signed the proposal were confused by it, but because they think they have identified a technicality that allows them to do so, a game of gotcha gone very bad.

What a sad marker of the times.

BERNSTEIN, J. (*concurring*). I acknowledge, as I must, that mandamus is an extraordinary remedy. I vote to grant mandamus relief today because of my consistent belief in the importance of elections in our representative democracy.[1] Throughout the years, I have voted to grant relief in a number of election cases. *Rocha v Secretary of State*, 509 Mich 1025, 1026-1028 (2022) (VIVIANO, J., dissenting) (joining Justice VIVIANO's dissenting statement that would grant the plaintiff's request for mandamus relief to be placed on the August 2022 primary ballot); *Raise the Wage MI v Bd of State Canvassers*, 509 Mich 876, 877 (2022) (BERNSTEIN, J., concurring in part and dissenting in part) ("I believe it is clear that a union label on an initiative petition is not subject to type-size requirements as set forth in MCL 168.482."); *Attorney General v Bd of State Canvassers*, 500 Mich 907, 914 (2016) (BERNSTEIN, J., dissenting) ("I would reverse the Court of Appeals rather than order expedited oral argument, as I believe that the Court of Appeals clearly erred. I write to further explain why I believe that appellant Jill Stein has met the

[1] " 'A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.' " *Attorney General v Bd of State Canvassers*, 500 Mich 907, 916 n 3 (2016) (BERNSTEIN, J., dissenting), quoting Hamilton, *Second Letter from Phocion* (April 1784), as published in *The Papers of Alexander Hamilton Volume III: 1782–1786*, Syrett & Cooke, eds (New York: Columbia University Press, 1962), pp 544-545.

statutory requirements for a recount.").[2] In numerous other cases where the legal issue before us was less clear-cut, I have voted for either further consideration or oral argument, given my strong interest in making sure we get these cases right. See *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1021 (2022) (BERNSTEIN, J., dissenting) ("Because I believe this case presents significant legal issues worth further consideration, I would order full briefing in this case and hold oral argument next week to ensure that the interests of Michigan voters are fully considered."); *Markey v Secretary of State*, 509 Mich 1021, 1021 (2022) (would have ordered oral argument); *Craig v Bd of State Canvassers*, 509 Mich 1021, 1021 (2022) (would have granted the bypass and ordered oral argument); *Cavanagh v Bd of State Canvassers*, 509 Mich 1028, 1028 (2022) (would have ordered oral argument); *Davis v Highland Park City Clerk*, 509 Mich 1029, 1029-1030 (2022) (WELCH, J., dissenting) (joining Justice WELCH's dissenting statement that would have found the legal issues worthy of further consideration); *League of Women Voters of Mich v Secretary of State*, 506 Mich 886, 887-888 (2020) (BERNSTEIN, J., dissenting) ("Because absentee ballots will undoubtedly play a significant role in the upcoming general election, I would hold oral argument in this case ahead of that election in order to ensure that the interests of Michigan voters are thoroughly examined and considered before votes are tallied, in order to avoid any potential disruption to the election process. The people of Michigan deserve nothing less."). I believe that my long-expressed interest in letting the people of Michigan make their own decisions at the ballot box speaks for itself.[3] Accordingly, I join this Court's decision to grant mandamus relief.[4]

ZAHRA, J. (*dissenting*). I dissent from the relief granted in the majority order, without first hearing oral arguments on an emergency

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[2] My vote in this case is consistent with my vote and my separate statement in *Promote the Vote 2022 v Bd of State Canvassers*, 510 Mich 884, 885-886 (2022) (BERNSTEIN, J., concurring).

[3] Justice ZAHRA notes that, while my long-standing position on election matters "has populist appeal, it ignores the requirements of our election law[.]" But our state Constitution opens with the reminder that "[a]ll political power is inherent in the people." Const 1963, art 1, § 1. I do not believe it inappropriate to keep the people of the state of Michigan in mind in any election matter that comes before us. Moreover, that the majority of this Court *disagrees* with the legal conclusions drawn by the dissents does not mean that we are ignoring the requirements of our election law.

[4] Justice ZAHRA notes that, as a wordsmith and a member of this Court, he finds it "an unremarkable proposition that spaces between words matter." As a blind person who is also a wordsmith and a member of this Court, I find it unremarkable to note that the lack of visual spacing has never mattered much to me.

basis to address whether the statutory term "full text" includes the spaces between words and, to the extent it does, the quantity of spacing that must be absent before a text may be deemed something less than the "full text" as that term is used in MCL 168.482(3).[1]

The question before this Court is not simply whether to allow a vote on this question of vital importance to Michiganders, a question that has not only captured the attention of the vast majority of Michigan residents, but also people across the nation. It is always a serious matter when the electorate considers amending our state Constitution. The stakes are raised higher when the subject matter of the amendment squarely addresses a matter that has been at the center of public debate for more than 50 years. But intense interest in the question presented does not change the law dictating the rules addressing the exercise of direct democracy. Our system for allowing citizens to access the ballot through the exercise of direct democracy is an elaborate one, which requires the collection of signatures on petitions that must display in exacting detail the provisions of the Constitution that will be affected along with the full text of the provisions to be added or deleted from the Constitution. Further, once the requisite number of petition signatures are gathered, they must be submitted to the Bureau of Elections for review before being submitted to the Board of State Canvassers for certification. If a majority of the Board of State Canvassers does not certify the proposal, the measure will not be placed on the ballot without legal intervention and the issuance of a writ of mandamus.

A mandamus action is an extraordinary writ against a public office or officer compelling the undertaking of a ministerial duty. The plaintiff bears the burden of demonstrating entitlement to that extraordinary remedy.[2] Mandamus will issue only when the right asserted is "clear and specific."[3] "Mandamus will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts but is designed to enforce a plain, positive duty [on behalf] of one who has a clear legal right to have it performed . . . ."[4]

The question before the Court would be easily resolved in favor of placing the measure on the ballot if Michigan were a "substantial compliance" state. As Justice VIVIANO observed, many states review the procedure for placement of ballot proposals for substantial compliance

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[1] As thoughtfully presented by Justice VIVIANO, the absence of spacing between words is no small matter. The absence of such spacing not only delays the visual processing of words, it also makes " 'lower frequency words disproportionately harder to identify . . . .' " *Post* at 911 (citation omitted).

[2] *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 249 (2016).

[3] *McLeod v State Bd of Canvassers*, 304 Mich 120, 125 (1942), citing *Nat'l Bank of Detroit v State Land Office Bd*, 300 Mich 240 (1942).

[4] *McLeod*, 304 Mich at 125, citing *Toan v McGinn*, 271 Mich 28 (1935).

—whether the proponents of the proposal substantially complied with the rules and procedures to obtain access to the ballot. But Michigan is not a substantial-compliance state. Instead, for more than 100 years, Michigan has required strict compliance with the process mandated for the exercise of direct democracy.[5] Yet, the fact that Michigan is a "strict compliance" state does not dictate that the present proposal should be removed from the ballot. In my view, the question before the Court is not a binary one: whether all the letters of the words of the constitutional amendment are present and presented in the proper order or, instead, whether any spacing between words is missing. Instead, the question before the Court is more nuanced: whether the absence of spacing between numerous words of the proposed constitutional amendment quoted on the petition so affects the text of the proposed amendment as to render the language printed on the petition less than the "full text" as that term is used in MCL 168.482(3). This is a question worthy of development in oral argument.

But the Court, under the pressure to decide the question forthwith in order to ensure timely production of the ballots, has decided to grant mandamus without oral argument. While I would prefer to engage in oral argument before deciding this issue, pressed for a ruling, I must conclude that plaintiffs have not met their burden of establishing a clear legal right to a writ of mandamus. The sum and substance of plaintiffs' position is that spaces between words do not matter. But, as demonstrated in Justice VIVIANO's dissenting statement, there is a substantial legal question whether Reproductive Freedom for All presented the full text of its proposed amendment in its petition. As a wordsmith and a member of Michigan's court of last resort, a court that routinely scrutinizes in great detail the words used in statutes and constitutional provisions, I find it an unremarkable proposition that spaces between words matter. Words separated by spaces cease being words or become new words when the spaces between them are removed.

Justice BERNSTEIN advocates that all doubt should be resolved in favor of allowing the people to vote. While this position certainly has populist appeal, it ignores the requirements of our election law, which is predisposed against granting ballot access where the Board of State Canvassers fails to grant certification. This is because the only remedy for a denial of ballot certification by the Board of State Canvassers is the issuance of a writ of mandamus. And, as previously stated, mandamus will only issue where the party seeking relief shows, among other things, it has a clear legal right to performance of the specific duty

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[5] See *Scott v Secretary of State*, 202 Mich 629 (1918); *Leininger v Secretary of State*, 316 Mich 644 (1947); *Kuhn v Dep't of Treasury*, 384 Mich 378, 385 (1971); *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 594 (2012) (opinion by MARY BETH KELLY, J.).

sought and the defendant has a clear legal duty to perform that duty.[6] Accordingly, where there is any colorable legal argument against certification by the Board of State Canvassers, mandamus will not issue. "It is a basic principle of law that in mandamus proceedings no court has the right to substitute its own discretion for the discretion of the . . . officers [assigned to discharge the duty in question]."[7]

Here, the Board of State Canvassers had ample reason to deny certification. Plaintiff Reproductive Freedom for All had obtained pre-certification of the form and content of its petition in support of the proposed constitutional amendment. The petition that was approved by the Bureau of Elections is different from the printed petition circulated and signed by more than 700,000 voters. Spacing between many words present on the preapproved petition is noticeably absent from the petition circulated by Reproductive Freedom for All, resulting in numerous long passages of letters that are clearly distracting from the proposal as a whole and in some instances exceedingly difficult to decipher into the discrete words that make up this proposal. The problem with these petitions is clearly evident upon casual review and must have been evident to the proponents of this petition drive. Rather than correct the deficiency with the petition by securing a petition that conformed precisely to the petition that received approval from the Bureau of Elections, Reproductive Freedom for All ignored the defect in the petition and forged on with the collection of signatures. The only thing more difficult to discern than the disputed portions of the text of the amendment is why the proponents of the amendment proceeded to circulate a petition that plainly did not conform to the form and content of the petition preapproved by the Bureau of Elections.[8]

Although I would have preferred to engage in oral argument before being pressed into rendering a decision on this matter, for the reasons stated above I conclude that plaintiffs have failed to meet the high burden of showing a clear legal right to have this proposed constitutional amendment placed on the general-election ballot. This conclusion is not a statement regarding the substance of the proposed amendment, but rather a statement about the presentation of the proposal and my doubts that the form and content of the petition comply with Michigan law.

I understand my colleagues' desire to decide this question forthwith without the benefit of oral argument, given the very short time that

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[6] *Johnson v Bd of State Canvassers*, 341 Mich App 671, 685 (2022), citing *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518 (2014).

[7] *Nelson v Wayne Co*, 289 Mich 284, 296 (1939) (quotation marks and citation omitted).

[8] Proceeding in this manner was a great gamble, but one that paid off, as a majority of the Court has seen fit to place this proposed amendment on the general-election ballot.

exists between the filing of this action for mandamus and the date the finalized ballot must be forwarded to printers for statewide production. The Board of State Canvassers deadlocked on the certification question on August 31, 2022. The action for mandamus was filed on September 1, 2022, and the Court was informed that a decision must be issued by September 8. This short time frame was truncated even more by the Labor Day holiday. Further, the instant action does not stand alone. Two other actions for mandamus were filed on or about September 1, 2022, that demanded action on or before September 8: *Anderson v Bd of State Canvassers* (Docket No. 164747) and *Promote the Vote 2022 v Bd of State Canvassers* (Docket No. 164755). A third preexisting action involving ballot access also requires quick resolution: *Davis v Highland Park City Clerk* (Docket No. 164564). Ten briefs from litigants and amici curiae were filed in this matter, which, with exhibits and appendices, produced in excess of 1500 pages of materials submitted for consideration by the Court. Briefs in the other election matters were also substantial, albeit less voluminous.

Thus, I again renew my call to for the Legislature to amend our election laws to require certification by the Board of State Canvassers at least six weeks before the affected ballot must be finalized. See *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1016-1017 (2022) (ZAHRA, J., concurring); *Promote the Vote 2022 v Bd of Canvassers*, 510 Mich 884, 890-894 (2022) (ZAHRA, J., dissenting) (order issued simultaneously with the instant order). Such a time frame would allow this Court and the litigants adequate time to develop legal arguments for and against ballot access, the opportunity for those arguments to be argued in court, and time for thoughtful deliberation by this Court regarding the legal questions presented before issuing a written opinion resolving the dispute. Over the past decade, ballot-access litigation has become commonplace in general-election years.[9] The time in which this Court is called upon to act in such

[9] *Anderson v Bd of State Canvassers*, 510 Mich 878 (2022); *Cavanagh v Bd of State Canvassers*, 509 Mich 1028 (2022); *Brandenburg v Bd of State Canvassers*, 509 Mich 1021 (2022); *Turner v Secretary of State*, 509 Mich 1028 (2022); *Rocha v Secretary of State*, 509 Mich 1025 (2022); *Craig v Bd of State Canvassers*, 509 Mich 1021 (2022); *Johnson v Bd of State Canvassers*, 509 Mich 1015 (2022); *Markey v Secretary of State*, 509 Mich 1021 (2022); *Raise the Wage MI v Bd of State Canvassers*, 509 Mich 876 (2022); *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 505 Mich 1137 (2020); *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42 (2018); *Mich Comprehensive Cannabis Law Reform Comm v Secretary of State*, 500 Mich 858 (2016); *People Should Decide v Bd of State Canvassers*, 820 NW2d 165 (Mich, 2012); *Mich Alliance for Prosperity v Bd of State Canvassers*, 820 NW2d 166 (Mich, 2012); *Protect*

cases is woefully insufficient and dramatically impedes our ability to give full and complete consideration to the weighty and important questions that typically accompany these challenges. The people deserve the full consideration and deliberation that this Court traditionally affords to matters of great significance to Michigan. I call upon the Legislature to correct this deficiency forthwith.

VIVIANO, J. (*dissenting*). This case raises a rather prosaic question with momentous consequences: do spaces between words matter? Plaintiff Reproductive Freedom for All[1] circulated to the voters a petition proposing a constitutional amendment that would create a right to abortion. The Board of State Canvassers failed to approve the petition, deadlocking on whether it met the requirements to be certified for the November ballot. Plaintiffs now seek a writ of mandamus that would order the board to certify the petition. Mandamus is available only if, among other things, an individual or entity has a clear legal duty to undertake a ministerial act. *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 82 (2021).

Both by constitutional mandate and statutory law, plaintiff, as the proponent of the petition, was required to place the "full text" of the amendment on the petition. Const 1963, art 12, § 2; MCL 168.482(3). The petition that plaintiff circulated, however, lacked any discernable spaces between the words in the core provisions of the amendment.[2] The specific legal question presented is whether these petitions, with the key

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Our Jobs v Bd of State Canvassers, 820 NW2d 167 (Mich, 2012); *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763 (2012); *Citizens for More Mich Jobs v Secretary of State*, 820 NW2d 166 (Mich, 2012).

[1] The two other plaintiffs in this case were individuals who signed the petition circulated by Reproductive Freedom for All. For ease of reference, the singular "plaintiff" will refer only to the latter.

[2] Plaintiffs contend that there are spaces because the printer put them there, even though they are not visible. In fact, it has provided an affidavit from the printer averring that "[w]hile spaces [were] included in both the Electronic Proof and the Printed Proof between each of the [relevant words] . . . , on the Printed Proof the spacing between those words and the words appear closer together as a result of word spacing settings applied [by] Adobe InDesign when preparing the Electronic Proof." In other words, there were spaces there, but the spacing settings were such that the spaces were not visible to the naked eye. Although the electronic formatting error may explain why this occurred, for purposes of evaluating a written legal text, a space that cannot be discerned on the page is no space at all. And of course, the printer's electronic version of petition showing some sort of coded signal for "space" was not what was submitted to the petition signers. Indeed, MCL 168.482(3) requires that the "full text of the amendment" "be printed" on the petition, removing any doubt that it is what is actually printed on the petition that ultimately matters.

words jammed together, contain the "full text" of the amendment. I conclude that they do not. The "full text" requirement means just that: the full text. The language on the petitions is not the full text that plaintiff seeks to insert into the Constitution, as the latter language contains the spacing the former lacks. The petition therefore has failed to meet the legal prerequisites for being placed on the ballot, and a writ of mandamus should not be issued. I therefore dissent from the Court's order today ordering the petition to be certified for the ballot.

At the outset, it is important to emphasize the proper judicial role in cases like this one:

> [W]e do not consider whether the proposed amendment at issue represents good or bad public policy. Instead, we must determine whether the amendment meets all the relevant constitutional requirements. There may be an "overarching right" to the initiative petition, "but only in accordance with the standards of the constitution; otherwise, there is an 'overarching right' to have public policy determined by a majority of the people's democratically elected representatives." In particular, we have stated that the "right [of electors to propose amendments] is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution." [*Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 60 (2018) (citations omitted).]

And it is especially important in cases of intense public interest "that in construing constitutions, courts have nothing to do with the argument *ab inconvenienti*, and should not 'bend the Constitution to suit the law of the hour.' " 1 Cooley, Constitutional Limitations, 72 n 2 (2d ed), quoting *Greencastle Twp v Black*, 5 Ind 557, 565 (1854), overruled in part by *Robinson v Schenck*, 102 Ind 307 (1885).[3] No matter the popularity of a proposal, then, when the conditions for placement of an initiative before the ballot are met, it must be certified as sufficient for

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[3] See also Constitutional Limitations, p 72 n 2 (" 'It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. . . . I have never yielded to considerations of expediency in expounding it [i.e., the fundamental law]. There is always some plausible reason for latitudinarian constructions . . . .' "), quoting *Oakley v Aspinwall*, 3 NY 547, 568 (1850).

placement on the ballot, see *Citizens*, 503 Mich at 55, and just the same, when those conditions are not met, the amendment may not be placed before the voters for their approval.[4]

Turning to the case at hand, amendments proposed by petition are governed by Const 1963, art 12, § 2. That provision states, in relevant part: "Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by" a certain number of registered electors. In addition, MCL 168.482(3) provides that a summary of the amendment must appear on the amendment and that "[t]he full text of the amendment so proposed must follow the summary and be printed in 8-point type." Nothing in the constitutional or statutory texts expressly mentions word spacing. Thus, the question is whether the "full text" requirement encompasses the spacing of the amendment, such that the word spacing of at least the core parts of the amendment must appear on the petition in the same manner as it is intended to appear in the Constitution if ratified.[5] Unsurprisingly, our caselaw does not directly answer this question, and it appears that courts in other jurisdictions also have not addressed word-spacing issues on petitions.

The starting point of the analysis is the language "full text." This term—and the larger phrase of which it is a part—originates from the 1908 Constitution. See Const 1908, art 17, § 2, as amended ("Every [petition proposing a constitutional amendment] shall include the full text of the amendment so proposed, and be signed by" a certain number of electors.). At the time, "full" was relevantly defined as "[c]omplete ; entire" or "[n]ot wanting in *any part* or essential quality[.]" *Webster's New International Dictionary of the English Language* (1930 reprint of 1909 edition) (emphasis added); see also *Webster's Collegiate Dictionary* (1916) (defining "full" as, among other things, "[c]omplete ; entire"). "Text" was defined relevantly as:

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[4] The Chief Justice thinks it "a sad marker of the time" that two members of the board did not place this on the ballot based on "a technical violation of the statute." But it is difficult to square this observation with the board's duty to determine the sufficiency of the petition's form in order to ensure that it "meets all the relevant constitutional requirements." *Citizens*, 503 Mich at 60. Moreover, the substantial-compliance regime that the Chief Justice seems to envision is, as will be discussed, simply not our law. Finally, although the Chief Justice uses incendiary rhetoric, it would seem beyond cavil that a voter is not disenfranchised when he or she is prevented from voting on a petition that does not meet the constitutional requirements (that were themselves adopted by the voters).

[5] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 93 ("Nothing is to be added to what the text states or reasonably implies[.]") (boldface omitted).

> **1.** A composition on which a note or commentary is written ; *the original words of an author*, in distinction from a paraphrase, annotation, or commentary. . . . **5. a** The main body of matter on a printed or written page, as distinguished from notes, etc. . . . . [*Webster's Collegiate Dictionary* (1916).]

When this language was again ratified in the 1963 Constitution, the definition of "text" was largely the same:

> 1. the actual or original words of an author, as distinguished from notes, commentary paraphrase, translation, etc.
>
> 2. the main body or substance of a book or manuscript, as distinguished from headings, marginal notes, etc.
>
> 3. the actual structure of words in a piece of writing or printing; wording. [*Webster's New Twentieth Century Dictionary of the English Language*, Unabridged Edition (1977).]

The ordinary meaning of "full text," then, is the entire or complete body or structure of the original words of an author. In this context, the original words are those of the amendment itself. We cannot stop the interpretation here, however, because this Court and many others have examined full-text requirements and provided useful guidance in giving this language meaning. In *Scott v Secretary of State*, 202 Mich 629 (1918), we examined the identical full-text requirement under our 1908 Constitution. In that case, the petition sought to add a new section to the Constitution that would simply revive a statute that had previously been repealed. *Id*. at 629, 645. But the language of the statute was not placed on the petition. Examining whether this rendered the petition invalid as not containing the "full text" of the amendment, we first explained that ascertaining whether the petition contained the full text of the amendment "involves the exercise of no discretion, the performance of none but a ministerial duty." *Id*. at 644. It was plain to the Court that the failure to include the language of the former statute was fatal to the petition. *Id*. at 646.

We further elaborated on the proper approach to the full-text requirement in *Leininger v Secretary of State*, 316 Mich 644 (1947). There, the initiative was for passage of a statute proposed by petition, but the petition lacked the title to the law. As with constitutional amendments, such initiative petitions needed to contain the proposed law " *'in full*.' " *Id*. at 647, quoting Const 1908, art 5, § 1. Proponents suggested that the title could be added to the ballot to be reviewed when people voted on the measure. In rejecting this argument, we affirmed that the full-text requirement had to be followed to the letter:

> The suggestion overlooks the requirements of article 5, § 1, that each section of the petition, when filed, shall contain a copy of the title of the proposed measure, and that the petition shall set forth the proposed measure in full. These requirements are mandatory.

> Full compliance is a prerequisite to transmittal of the measure to the legislature and submission thereof to the people. [*Id*. at 650.][6]

We have similarly and more recently affirmed that the petition-form requirements in MCL 168.482 must be applied as written and thus, substantial compliance—"the doctrine . . . whereby technical deficiencies are resolved in favor of certification" of the petition—with the requirements is insufficient. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 594 (2012) (opinion by MARY BETH KELLY, J.).

In *Leininger*, we also rejected an argument that plaintiffs here make in support of the petition: that the full-text challenge to the petition goes to its substance and, as such, the entity charged with reviewing the petition could not reject it simply because review is limited to the sufficiency of the signatures and the form of the petition.[7] While the underlying constitutionality of an initiative law is not to be reviewed before its ratification (and thus is not a reason to decline certification of the initiative to the voters), see *Hamilton v Secretary of State*, 212 Mich 31, 34-35 (1920), *Leininger* explained that it is a different question altogether "whether the petition, in form, meets the constitutional requirements so as to qualify it for transmittal" to the people for a vote, *Leininger*, 316 Mich at 651. Accordingly, because the question was properly before the Court and the lack of a title clearly violated the full-text requirement, the petition in *Leininger* could not be submitted to the voters. *Id*. at 656.[8]

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[6] See also *Kuhn v Dep't of Treasury*, 384 Mich 378, 385 (1971) (characterizing *Scott* and *Leininger* as requiring strict compliance with the constitutional text).

[7] At the time of *Leininger*, the Secretary of State reviewed the form of petitions and sufficiency of the signatures. See *Leininger*, 316 Mich at 647-648. Now, the Board of State Canvassers is tasked with " 'determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification.' " *Unlock Mich v Bd of State Canvassers*, 507 Mich 1015, 1015 (2021) (citation omitted).

[8] Other courts have likewise stated that a "full text" challenge does not go to the substantive legality of an amendment but to the form of the petition, opining that disregard of such prerequisites would be "revolutionary." See *Moore v Brown*, 350 Mo 256, 263 (1942) ("[I]t is fundamental that the people, themselves, are bound by their own Constitution, 1 Cooley on Constitutional Limitations (8 Ed.), p. 81. Where they have provided therein a method for amending it, they must conform to that procedure. Any other course would be *revolutionary*, the cases have said. And whether the prescribed procedure is being followed is a matter for judicial determination when the organic law permits such inquiry while the legislation is in process.") (citations omitted); *Larkin v Gronna*,

These cases establish the principles that the "full text" requirement must be fully complied with and that a challenge based on that requirement can properly be considered by the board and this Court.[9] Yet we have never precisely defined the scope of the requirement.[10] There is, however, over a century of caselaw from across the country examining the meaning and function of this requirement and other similar requirements. These cases help explain the role served by the "full text" requirement in the context of initiative petitions.[11]

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69 ND 234, 242 (1939) ("[T]he people themselves must follow the constitutional method prescribed [for amending their constitution]. To do otherwise would be revolutionary. . . . The people, in creating this government, were competent to and did disable themselves from saying whether their Constitution should be changed otherwise than in a particular manner.").

[9] By leaving open the possibility that this is not a challenge to the petition's form and content, the majority ignores our binding precedent in *Leininger*.

[10] In one brief order, we indicated that an unspecified "inaccuracy" in a petition—which we hinted was an "omission" of text—was nevertheless "sufficiently accurate to comply with" MCL 168.482(3)'s requirement that the full text be provided. *Council About Parochiaid v Secretary of State*, 403 Mich 396, 397 (1978). Our order is too cursory to make sense of for purposes of the present case. We did not adequately describe the facts at hand, let alone attempt to interpret or apply the term "full text." Moreover, the order has been characterized as requiring only substantial compliance, which is a doctrine this Court has since rejected. See *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492 (2004) (citing *Council About Parochiaid* for the proposition that "[t]he [Board of State Canvassers'] authority and duties with regard to proposed constitutional amendments are limited to determining whether the form of the petition *substantially* complies with the statutory requirements and whether there are sufficient signatures to warrant certification of the proposal").

[11] In requiring compliance with the text of the law in this area, we have eschewed the doctrine of substantial compliance. Many other states have not, however, and under that doctrine typographical errors in petitions are commonly held not to prevent certification as long as the error does not cause the petition to become inaccurate or the integrity of the petition process to be impaired. See, e.g., *Costa v Superior Court*, 37 Cal 4th 986, 1012 (2006) (under a substantial-compliance regime, noting that the key question is whether the "departure from a statutory requirement has been found to pose a realistic threat to the accuracy and integrity of the process—for example, by misleading the potential signers of an initiative petition regarding a significant feature of the

Courts have long observed that the function and aim of the term "full text" is apparent from its words.[12] As the Ohio Supreme Court said of this requirement a century ago, "There is no possible misunderstanding of these provisions. The constitution requires that every voter shall have laid before him in as complete and effective a manner as 'may be reasonably possible' the proposal upon which he is to vote." *State ex rel Greenlund v Fulton*, 99 Ohio St 168, 181 (1919) (citation omitted). In other words, a requirement that the "full text" be given to the voter means that the *entire* text must be provided in a manner that effectively conveys the complete proposed amendment. This in turn means that the *exact* text of the amendment must appear on the petition. Addressing constitutional language identical to ours, the Oregon Supreme Court has held that "[t]he full-text requirement of our constitution means exactly what it says. The petition must carry the exact language of the proposed measure." *Schnell v Appling*, 238 Or 202, 205 (1964). Construing the term "full text," the high court in Massachusetts stated:

> The matter to be submitted to the people for their approval or rejection is the proposed law in the precise terms in which it is stated in the petition. It is the proposed law in these precise terms that will become law if adopted. The purpose of the provision requiring the Secretary to send to each voter the "full text" of a proposed law that is to be submitted to the people is to afford to every voter opportunity "to know before the day of election the terms of every measure on which he is to vote." The words 'full text,' as used in the constitutional provisions, refer to the precise terms of a proposed measure and nothing more. [*Opinion of the Justices to the Senate and House of Representatives*, 309 Mass 555, 559-560 (1941) (citation omitted).]

The Missouri Supreme Court has similarly construed a requirement that a "full and correct copy" of the text be attached to an initiative

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proposed measure"). In many of these states, the substantial-compliance rule arises from their constitution or statutory law. See, e.g., *Oklahoma's Children, Our Future, Inc v Coburn*, 421 P3d 867, 878 (Okla, 2018) (discussing statutory provision establishing the sufficiency of substantial compliance with the required petition form); *Stickler v Ashcroft*, 539 SW3d 702, 710 (Mo Ct App, 2017) (same). This might be good policy, but until the people of Michigan or the Legislature sees fit to create a similar rule in Michigan, we must apply legal texts as written and have no power to excuse violations of them.

[12] See generally *People v Wood*, 506 Mich 114, 146 (2020) (VIVIANO, J., dissenting) ("A proper contextual analysis in this case includes consideration of statutory purpose 'in its concrete manifestations as deduced from close reading of the text.' "), citing *Reading Law*, p 20; see also *Reading Law*, p 20 ("The evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words.").

petition. *Moore v Brown*, 350 Mo 256, 262 (1942). Discussing a previous case, the court stated the law was that

> the full text of the *desired* amendment must be shown, thereby requiring a disclosure of what sections of the Constitution were to be amended, so the signers of the petitions might understand what they were signing. . . . [T]he measure must show not merely its *pre*text but its authentic text, as where we refer to the text of the Scriptures. [*Id*. at 265.]

Or, finally, as Justice Morris of the Supreme Court of North Dakota put it:

> The reason for this requirement is obvious. . . . The average voter does not have conveniently at hand the text of the Constitution or the statutes of this state; if, therefore, he is to have an opportunity to know fully and intelligently what he is doing when he signs or declines to sign a petition, or votes on a proposed amendment, it is only if the full text of the proposed amendment to the Constitution be inserted in the petition, and embodied in the publicity pamphlet sent him, that he will be able to do so. Before he votes, if the proponents of the measure faithfully do their duty, he will have an opportunity to read a ballot title that fairly and briefly represents the measure proposed, or if he desire, he may read the full text of the amendment. [*Larkin v Gronna*, 69 ND 234, 253 (1939) (Morris, J., dissenting).[13]

The upshot of these and other cases is that the full-text requirement mandates the text be presented in the way it will appear in the constitution such that the petition signers can interpret what they are signing.[14] In this regard, there is a substantial overlap between the full-text requirement and the similar requirement contained in some

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[13] The majority did not address the purpose or meaning of the requirement, having determined that the court did not possess the power to review whether the constitutional requirement had been met after the election was held. Justice Morris went on to say that a related requirement that voters be sent a "copy" of the measure "can only mean the entire measure, the full text of the measure." *Id*. at 255.

[14] See also *Walmsley v Todd*, 2012 Ark 370, p 8 (2012) ("We have previously discussed the attachment mandate [i.e., the requirement that a "full and correct copy" of the measure be attached to the petition] and have explained that its purpose is to inform voters of what they are signing before they sign it."); *Kerr v Bradbury*, 193 Or App 304, 318 (2004) (noting that " '[f]ull text' provisions are not uncommon" and "[t]heir general purposes are fairly well-established," namely, facilitating understanding of the proposed measure so that voters can make an intelligent decision); *Mervyn's v Reyes*, 69 Cal App 4th 93, 99 (1998) ("The purpose of the full text requirement is to provide sufficient

other states' laws that require petitions to include the "exact copy" of the proposed measure. The Oklahoma Supreme Court, which requires strict compliance with its state's "exact copy" requirement, has held that a petition that lacked section numbering in the text but contained "all the substantive language of the bill" was invalid. *Oklahoma's Children, Our Future, Inc v Coburn*, 421 P3d 867, 878 (Okla, 2018). Explaining its conclusion, the court observed that the lack of section numbers left readers with "no easy method of locating" the portion of the relevant law that was already repealed. *Id*. at 881. Continuing, the court stated that "[w]ithout the section numbers present, any internal navigation of the bill at issue becomes excessively cumbersome." *Id*.

In a slightly different context—concerning an "exact copy" requirement allowing use of "exact copies" of a petition developed by the Secretary of State—Massachusetts's highest court has explained that this requirement is an important part of the balance struck by direct-democracy provisions, which allow the people to participate directly in proposing and making laws but are hedged by "safeguards against abuse of those means . . . ." *Hurst v State Ballot Law Comm*, 427 Mass 825, 828 (1998). For that reason, the court elsewhere concluded that "[e]xact copy means exact copy. The statute does not permit any alterations of forms, whether by copying machine, petition circulator, or petition signer." *Walsh v Secretary of the Commonwealth*, 430 Mass 103, 108 (1999) (citation omitted). The requirement therefore extended not just to those errors that might mislead signers but to any alterations; the court declined to establish a standard of case-by-case review to determine the source and effect of the alteration. *Id*. at 107-108. This rule, however, did not extend to disqualify a petition where printed information was photocopied "upside down at the bottom of the back of the papers," as readers would easily be able to invert the paper to read it. *Robinson v State Ballot Law Comm*, 432 Mass 145, 151 (2000).

In light of the common definitions of "full text" and the relevant caselaw exploring this language, it is evident that the "full text" of an amendment must be the entire or complete set of words of the amendment itself, such that the petition readily conveys to the reader what the actual language of the amendment will be if passed. The "full text" requirement functions to ensure that readers of the petition do not have to overcome obstacles to interpret it or guess at what the amendment might be once it becomes law. "The law," after all, "is a profession of words," and "[t]o be of any use, the language of the law (as any other language) must not only express but convey thought." Mellinkoff, *The Language of the Law* (Boston: Little, Brown and Company, 1963), p vii.

Without analysis or citation of legal authority, the majority order summarily concludes that a "full text" exists when all the words of the amendment appear in the correct order on the page. These may be essential ingredients of the "full text," and they may, at least in some circumstances, be sufficient to prevent the text from being undecipherable. But they certainly do not represent all that is required for text to

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information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion.").

meaningfully communicate to the reader. For well over a thousand years, we have conveyed thought and meaning by using spaces between words. See Saenger, *Space Between Words: The Origins of Silent Reading* (Stanford: Stanford University Press, 1997), p 32. It was not always so. Ancient text employed *scriptura continua*, in which words were uninterrupted by word spaces. *Id*. at 9. But the objectives of reading in ancient times were different, with the focus being on memorization useful to an oral rather than a text-based culture. See generally *id*. at 6-8. Even so, writers would "aid[] the reader in the task of grasping letters for syllable recognition . . . by regularly placing relatively more space between letters than is customary for medieval or modern handwritten and printed text." *Id*. at 8. By the seventh century, writings from the British Isles began to consistently employ spacing or other symbols to mark the boundaries of words. *Id*. at 32. This system was regnant across all of western Europe by the thirteenth century. *Id*. at 256.

There were good reasons for including spaces in text. As the leading scholar on this topic has observed, "in Western scripts, spatial organization is a *determinative* element in the effect of different transcription systems on the cognitive processes required for lexical access and hence on the propensity to read orally or silently." *Id*. at 5 (emphasis added). This is confirmed by numerous experiments demonstrating "that the total suppression or partial obfuscation of spatial boundaries between words increases [for adults] the duration of the cognitive activity necessary for reading, which in turn produces physiological reactions associated with vocal and sub-vocal activity." *Id*. When word spaces are removed, readers experience "tunnel vision." *Id*. at 6. The span at which "preliminary details of words or letters can be recognized" is reduced, as is "the broader field within which only the grossest characteristics of signs, words, and spatial arrangement can be perceived." *Id*. This significantly affects reading ability, as "[o]nly scripts that provide a consistently broad eye-voice span to oral readers can sustain rapid, silent reading as we know it." *Id*.; see also Paterson & Jordan, *Effects of Increased Letter Spacing on Word Identification and Eye Guidance During Reading*, 38 Memory & Cognition 502, 502 (2010) (noting studies showing "that spaces between words in text are of considerable importance in the reading of English and that interword spaces may help readers by aiding processes involved in word identification and eye guidance"). The problems with unspaced texts go beyond simple delays in the visual processing of words: studies have shown that the lack of spaces interferes with the actual identification of words. *Id*. at 502-503 (noting a study arguing "that if removing the spaces between words increased the size of the word frequency effect, by making lower frequency words disproportionately harder to identify, this would show that the removal of interword spacing interfered with word identification, rather than interfering only with a more superficial level of visual processing" and noting that the study "indicat[ed] that the absence of interword spaces interfered with actual word identification"); see also *id*. at 503 (noting other studies demonstrating the importance of interword spacing).

Placed in historical context, then,

> [t]he importance of word separation by space is unquestionable, for it freed the intellectual faculties of the reader, permitting all texts to be read silently, that is, with eyes alone. As a consequence, even readers of modest intellectual capacity could read more swiftly, and they could understand an increasing number of inherently more difficult texts. Word separation also allowed for an immediate oral reading of texts, which eliminated the need for the arduous process of the ancient *praelectio*.[15] Word separation, by altering the neurophysiological process of reading, simplified the act of reading, enabling both the medieval and modern reader to receive silently and simultaneously the text and encoded information that facilitates both comprehension and oral performance. [*Space Between Words*, p 13.]

See also *id*. at 17 (noting that word-separation and word-ordering conventions "had the similar and complementary physiological effect of enhancing the medieval reader's ability to comprehend written text rapidly and silently by facilitating lexical access"). No doubt this is why, today, spacing is a constitutive element of the definition of "word": "A unit of language . . . that functions as a principal carrier of meaning" and that "is separated from other such units by spaces in writing . . . ." *Random House Webster's College Dictionary* (2001).[16] And all works on style and grammar appear to either prescribe or assume that words will receive separate spacing. See, e.g., Garner, *The Redbook: A Manual on*

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[15] The *praelectio* was the initial preparation of reading a text in which a person "had to read orally, aloud or in a muffled voice, because overt physical pronunciation aided the reader to retain phonemes [i.e., distinct units of sound] of ambiguous meaning." *Space Between Words*, p 8. "Oral activity helped the reader to hold in short-term memory the fraction of a word or phrase that already had been decoded phonetically while the cognitive task of" recognizing words, which is "necessary for understanding the sense of the initial fragment, proceeded through decoding of a subsequent section of text." *Id*.

[16] The point of the dictionary definition of "word" is not to suggest that words *invariably* require spaces. Words are used in a variety of contexts, some of which, such as social media, dispense with spaces. Rather, the critical interpretive inquiry is how the language of a legal text is ordinarily used, in light of any caselaw bearing on that meaning. See generally *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339 (2020) ("In every case requiring statutory interpretation, we seek to discern the ordinary meaning of the language in the context of the statute as a whole."). Here, as described above, the term "full text" encapsulates the common concept of words. Thus, amicus curiae Neal Goldfarb's observation that some dictionaries define words as "nor-

Legal Style (3d ed), § 4.12, p 94 (prescribing "one space between words and one space after punctuation marks (including colons and periods)") (boldface omitted).

This makes sense. If spacing truly were irrelevant to text, then presumably all the letters of an amendment could be placed on top of each other, in the space for a single character. Or consider how a request for the "full text" of some document is used in everyday speech. If, for example, an employer asked a subordinate for the "full text" of the most recent report, and received in response a version without spaces between words, the subordinate would likely be reprimanded. And this Court would not look kindly on an attorney who submitted his or her brief without word spacing.

Spacing thus facilitates reading and comprehension, and it has been used for over a thousand years.[17] As such, it is not only a component of text, but a critical one, especially in the present context. The language of the law can be hard enough to parse even when it is perfectly reproduced. Where, as here, the core lines are riddled with dozens of spacing errors, the task of reading and comprehension becomes "excessively cumbersome." *Oklahoma's Children*, 421 P3d at 881. Potential petition signers often receive the form to sign from a circulator while walking down the street or into a store—hardly ideal locations to parse legal text, let alone text without word spacing. But, as the literature above shows, even if the petition here was received in a manner allowing for quiet contemplation, the errors significantly impeded the capacity for reading and comprehending the key lines and thus implicated the very function of the "full text" requirement.

Such a situation must be taken seriously, as it is "[a] necessary assumption of the petition process . . . that the signer has undertaken to read and understand the petition." *Mich Civil Rights Initiative v Bd of State Canvassers*, 475 Mich 903, 904 (2006) (MARKMAN, J., concurring). As the North Dakota Supreme Court has observed, "The people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that this amendment is for the public good and

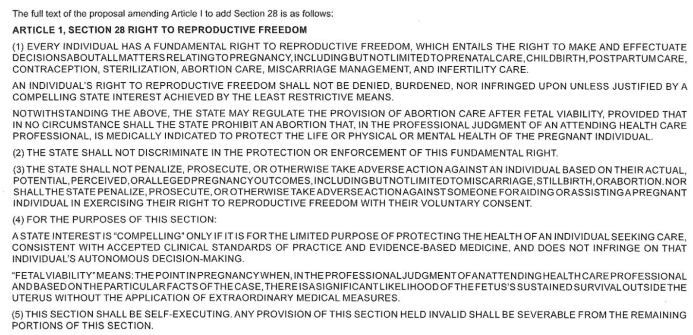
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mally," "typically," or "ordinarily" separated by spaces actually serves to support the conclusion that the meaning conveyed by "full text" requires words separated by spaces.

[17] Amicus Goldfarb discusses this history and the lack of spacing in some foreign languages to make the point that words without spaces *can* be understood. But once again, this misses the task before the Court: determining whether the phrase "full text" as used in the Constitution and applicable statute requires word spacing. That is, does the ordinary understanding of this phrase, in light of relevant caselaw, encompass spaces? The fact that our language has used such spaces in almost all contexts for such a long period of history, and that these spaces make possible rapid reading comprehension, strongly supports the conclusion that word spaces are part of the ordinary meaning of "full text."

expresses the free opinion of a sovereign people." *Larkin*, 69 ND at 241-242. But this requires that the necessary prerequisites have been followed. *Id*. And the prerequisite here—disclosure on the petition of the "full text"—operates to ensure that electors have the opportunity to read and understand the proposition being presented. To effectuate this, the Constitution and statutes require the electors to be given the actual text that will make its way into the Constitution.

That was not accomplished here. Consider what the reader viewed when presented with the petition:



The full text of the proposal amending Article I to add Section 28 is as follows:

ARTICLE 1, SECTION 28 RIGHT TO REPRODUCTIVE FREEDOM

(1) EVERY INDIVIDUAL HAS A FUNDAMENTAL RIGHT TO REPRODUCTIVE FREEDOM, WHICH ENTAILS THE RIGHT TO MAKE AND EFFECTUATE DECISIONSABOUTALLMATTERSRELATINGTOPREGNANCY,INCLUDINGBUTNOTLIMITEDTOPRENATALCARE,CHILDBIRTH,POSTPARTUMCARE, CONTRACEPTION, STERILIZATION, ABORTION CARE, MISCARRIAGE MANAGEMENT, AND INFERTILITY CARE.

AN INDIVIDUAL'S RIGHT TO REPRODUCTIVE FREEDOM SHALL NOT BE DENIED, BURDENED, NOR INFRINGED UPON UNLESS JUSTIFIED BY A COMPELLING STATE INTEREST ACHIEVED BY THE LEAST RESTRICTIVE MEANS.

NOTWITHSTANDING THE ABOVE, THE STATE MAY REGULATE THE PROVISION OF ABORTION CARE AFTER FETAL VIABILITY, PROVIDED THAT IN NO CIRCUMSTANCE SHALL THE STATE PROHIBIT AN ABORTION THAT, IN THE PROFESSIONAL JUDGMENT OF AN ATTENDING HEALTH CARE PROFESSIONAL, IS MEDICALLY INDICATED TO PROTECT THE LIFE OR PHYSICAL OR MENTAL HEALTH OF THE PREGNANT INDIVIDUAL.

(2) THE STATE SHALL NOT DISCRIMINATE IN THE PROTECTION OR ENFORCEMENT OF THIS FUNDAMENTAL RIGHT.

(3) THE STATE SHALL NOT PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST AN INDIVIDUAL BASED ON THEIR ACTUAL, POTENTIAL, PERCEIVED, OR ALLEGED PREGNANCY OUTCOMES, INCLUDING BUT NOT LIMITED TO MISCARRIAGE, STILLBIRTH, OR ABORTION, NOR SHALL THE STATE PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST SOMEONE FOR AIDING OR ASSISTING A PREGNANT INDIVIDUAL IN EXERCISING THEIR RIGHT TO REPRODUCTIVE FREEDOM WITH THEIR VOLUNTARY CONSENT.

(4) FOR THE PURPOSES OF THIS SECTION:

A STATE INTEREST IS "COMPELLING" ONLY IF IT IS FOR THE LIMITED PURPOSE OF PROTECTING THE HEALTH OF AN INDIVIDUAL SEEKING CARE, CONSISTENT WITH ACCEPTED CLINICAL STANDARDS OF PRACTICE AND EVIDENCE-BASED MEDICINE, AND DOES NOT INFRINGE ON THAT INDIVIDUAL'S AUTONOMOUS DECISION-MAKING.

"FETAL VIABILITY" MEANS: THE POINT IN PREGNANCY WHEN, IN THE PROFESSIONAL JUDGMENT OF AN ATTENDING HEALTH CARE PROFESSIONAL AND BASED ON THE PARTICULAR FACTS OF THE CASE, THERE IS A SIGNIFICANT LIKELIHOOD OF THE FETUS'S SUSTAINED SURVIVAL OUTSIDE THE UTERUS WITHOUT THE APPLICATION OF EXTRAORDINARY MEDICAL MEASURES.

(5) THIS SECTION SHALL BE SELF-EXECUTING. ANY PROVISION OF THIS SECTION HELD INVALID SHALL BE SEVERABLE FROM THE REMAINING PORTIONS OF THIS SECTION.

The lines of compressed letters include those that directly establish the very right to abortion that the petition seeks to write into the Constitution. This is not the actual full text that the petition would ratify because it fails to include the spaces that would appear in the amended Constitution. The failure to include the spaces presents the amendment in a manner difficult to read and comprehend. Thus, it may have the right words in the right order—as the majority here suggests—but the lack of critical word spaces renders the remaining text much more difficult to read and comprehend, and therefore something less than the "full text" required by the Constitution and statutes.

It is worth noting that the board has rejected petitions for containing typographical errors, and the courts have upheld those determinations. See, e.g., *Mich Campaign for New Drug Policies v Bd of State Canvassers*, unpublished order of the Court of Appeals, entered September 6, 2002 (Docket No. 243506) (holding that in addition to failing the republication requirement, a numbering error on a petition rendered it defective and thus the board properly declined to certify). This evidence of historical practice provides support for the conclusion that the type of errors at issue in this case render the petition insufficient. See *In re Certified Questions*, 506 Mich 332, 407 (2020) (VIVIANO, J., concurring in part and dissenting in part) (noting that the historical and practical construction of a legal text by relevant governmental actors can be a useful interpretive consideration).

Finally, it is worth considering the possible legal consequences of the majority order. The majority concludes, again in summary fashion, that the spacing error here has not changed the meaning of the amendment.

But this conclusion would seem to rest on either a substantive review of the proposal of the sort that this Court has prohibited pre-election, see *Hamilton*, 212 Mich at 34-35, or more likely a substantial-compliance-type analysis, again of the sort we have rejected in this context, see *Stand Up for Democracy*, 492 Mich at 594 (opinion by MARY BETH KELLY, J.); *Leininger*, 316 Mich at 650. To the extent substantial compliance is relevant to the majority's analysis, the discussion above concerning the importance of word spacing demonstrates the seriousness of the error in the present case. I would, consequently, not find that the petition substantially complied with the law.

Even so, a substantial-compliance regime creates another wrinkle that the majority appears not to have considered. If the full-text requirement is subject to an analysis that asks whether the meaning has sufficiently changed or become ambiguous enough to potentially mislead, see, e.g., *Costa v Superior Court*, 37 Cal 4th 986, 1012 (2006), then presumably the determination of whether the full text is present involves at least some discretion. That is, a factual determination concerning the extent of the error and its probable effects must be made by the board. But if so, then it is hard to see how this decision can be characterized as ministerial and thus subject to mandamus. Or, if it is somehow subject to mandamus, then what level of deference would be owed to the board's factual determination concerning the extent and effects of the error? And what procedures would be employed to obtain an actual determination of the board, especially in cases of deadlock?[18] The majority's order here thus raises more questions about this area of the law than it answers.[19]

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[18] Cf. *Illinois Republican Party v State Bd of Elections of Illinois*, 294 Ill App 3d 915 (1998) ("Although we hold the Board's deadlock vote is reviewable by this court, we decline at this point to address the merits and enter findings on whether the complaints present justifiable grounds. We conclude better policy dictates that we remand to the Board for a statement of reasons by those members rejecting the recommendation of the hearing examiner and their general counsel. . . . We concur with the views expressed by the federal courts for requiring the Board members to state of record the reasons for their vote: such practice facilitates meaningful judicial review of a deadlock decision, contributes to reasoned decision making, ensures reflection and an opportunity for self-correction, and enhances the predictability of commission decisions for future litigants."), aff'd in part and vacated in part 188 Ill 2d 70, 75 (1999) (affirming the remand but vacating the remainder of the opinion).

[19] In noting that the challengers here did not provide any affidavits from petition signers expressing confusion with the language, the Chief Justice appears to suggest that another factual matter might be relevant, i.e., that a petition's compliance with the full-text requirement can be measured by whether signers were, in fact, confused. It is not

For these reasons, I would not order the Board of State Canvassers to certify the present petition for the November ballot. Contrary to the majority's conclusory assertion, the petition did not contain the "full text" of the amendment, and therefore the board acted properly in declining certification.[20] Accordingly, I dissent.

PEOPLE V MAJEED, No. 164735; Court of Appeals No. 362446. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the August 16, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the Kent Circuit Court's modification of the defendant's bond, REINSTATE her original $5,000 personal recognizance bond, and REMAND this case to the trial court for further proceedings not inconsistent with this order.

The trial court abused its discretion when it modified the defendant's bond without explaining its reasoning. When a court orders money bail, it must state "reasons . . . *on the record*" as to why "the defendant's appearance or the protection of the public cannot otherwise be assured . . . ." MCR 6.106(E) (emphasis added). Further, a court may only impose pretrial conditions if the court finds that personal recognizance "will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public . . . ." MCR 6.106(D). The court modified the defendant's bail from a $5,000 personal recognizance bond to a $25,000 cash bond with a weekly drug testing condition without any explanation for why the modification was reasonably necessary to ensure the defendant's appearance or to protect the public. We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). I would deny leave in this case. One of defendant's bond conditions was that defendant "not violate any law or commit any crime." Defendant violated this bond condition by testing positive for marijuana. Due to her age, she was not legally entitled to possess or use recreational marijuana, see MCL 333.27954(1)(c), and there is no indication in the record that defendant possessed a valid medical marijuana card. By violating Michigan law, defendant violated the conditions of her pretrial release. This, in my view, is sufficient reason to deny leave in this case.

ZAHRA, J., joins the statement of VIVIANO, J.

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clear where this requirement would arise from, how much confusion would be enough, and how much discretion the board would have in making these determinations.

[20] I agree with Justice ZAHRA's earlier call for the Legislature to provide additional time for the courts to review and decide election-law cases. *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1016 (2022) (ZAHRA, J., concurring). These cases often involve important matters of first impression that warrant more time than the current statutory scheme allows. In the present case, for example, we have received hundreds of pages of materials mere days before the constitutional deadline.

Leave to Appeal Denied September 9, 2022:

BROWNING v BUKO, No. 163538; Court of Appeals No. 356874.

VIVIANO, J. (*dissenting*). In the first months of the COVID-19 pandemic, this Court issued various orders that purported to toll statutory limitations periods. Defendants in this legal malpractice action contend that those orders were invalid because they were an unconstitutional exercise of legislative power. I believe defendants have raised a strong argument that should be considered now. I therefore dissent from the Court's order denying leave to appeal and would instead remand to the Court of Appeals for full consideration.

Our first order tolling statutory limitations periods, Administrative Order No. 2020-3, 505 Mich cxxvii (2020), was issued on March 23, 2020, near the outset of the pandemic. In it, we stated:

> For all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).[1]

The effect of this provision was to toll statutory limitations periods. We went on to say that the "order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses . . . ."[2] And the order expressly provided that "[c]ourts must have a system in place to allow filings without face-to-face contact . . . ." The tolling lasted for any day in which the Governor had declared an emergency. The order was effective as of March 10, 2020. We eventually ended the tolling period on June 20, 2020:

> In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. *For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020.* For filings with

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[1] *Id*. at cxxvii. MCR 1.108(1) sets forth how to count the last day of any period in the court rules or statutes.

[2] AO 2020-3, 505 Mich at cxxviii.

> time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.[3]

Thus, under this order, starting on June 20, 2020, a plaintiff would have the same number of days to file the claim as he or she had on March 23, 2020. The effect of our orders, then, was to toll the statutory limitations period from March 10, 2020, until June 20, 2020.[4]

The facts in the present case are lengthy, but the resolution of this appeal depends on our orders tolling the statutory limitations period. In June 2007, Brenda Cupp suffered a traumatic brain injury after a vehicle crash. Defendants Ruth Buko and her law firm, LeFevre & LeFevre, PLLC, represented Cupp in the resulting lawsuit. Plaintiff, Cupp's sister, obtained a guardianship over Cupp. Various proceedings dragged on for years, both here and in Kentucky. In April 2019, Cupp passed away. On June 30, 2020, plaintiff filed the present action (as guardian and conservator of Cupp as well as personal representative of Cupp's estate), against defendants, Cupp's former attorney and the attorney's law firm, for malpractice. Defendants responded by moving to dismiss the case, arguing among other things that the claim was barred by the statute of limitations. The probate court denied the motion, relying on this Court's administrative orders tolling the filing deadlines.[5] The Court of Appeals denied defendants' application for leave to file an interlocutory appeal, although Judge JANSEN voted to grant leave.

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[3] Administrative Order No. 2020-18, 505 Mich clxi, clxi (2020) (emphasis added).

[4] Throughout the relevant period, the Governor also issued executive orders with nearly identical provisions tolling statutory limitations periods. See, e.g., Executive Order No. 2020-58 (tolling "all deadlines applicable to the commencement of all civil and probate actions and proceedings, including . . . any statutory notice provision or other prerequisite related to the deadline for filing of such a pleading").

[5] It appears that plaintiff's action relies on MCL 600.5851(1), which tolls the statute of limitations for certain disabled individuals until "1 year after the disability is removed through death or otherwise . . . ." Cupp died on April 21, 2019, and this action was filed on June 20, 2020. Thus, assuming that Cupp was disabled and the limitations period was tolled by MCL 600.5851, she filed outside the one-year safe harbor offered by that statute. On March 10, 2020, plaintiff had 42 days to file the complaint. Because she filed well past that date, on June 30, 2022, her complaint would have been untimely. But under our administrative orders, the 42 days did not begin to run until June 20—consequently, the filing 10 days later was timely. The probate court recognized that our administrative orders made the difference. The court stated that under our orders, "starting on June 20th of 2020 plaintiff had the additional number of days that existed between March 23rd, 2020 and the expira-

Defendants now seek leave to appeal here. They have raised the argument that our administrative orders improperly exercised legislative power.[6] I believe defendants have presented a strong argument that merits our attention. We have very limited authority to issue court rules that prevail over statutes. We may do so only in matters dealing with practice and procedure in the courts and not in matters involving substantive law.[7] And, with regard to statutes of limitations, we have expressly stated that "[s]tatutes regarding periods of limitations are substantive in nature."[8] Accordingly, we held in *Gladych v New Family Homes, Inc*, "that, to the extent [a statute] enacts additional requirements regarding the tolling of the statute of limitations, the statute would supersede the court rule."[9]

Thus, our court rules and orders cannot trump a statute of limitations. And since nothing in the relevant statutory framework allows for the tolling that occurred here, the only potential grounds for the tolling order is under our equitable powers. But equitable tolling has been largely discredited.[10] We have noted that the equitable power "has traditionally been reserved for 'unusual circumstances . . . .' "[11] "Equitable tolling is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights."[12] A pandemic during which the courts remain open to receive filings would not fit that bill and, unsurprisingly, it does not appear that our broad tolling orders have any historical precedent. The closest analogy appears to be caselaw allowing equitable tolling when courts were completely closed or inaccessible during wartime. Even in that context, however, the original English rule was that "the non-existence of any Courts, or their being shut, is no plea to avoid the bar of the statute of limitations."[13] The

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tion of the one year safe harbor on April 21st, 2020 to file her case. Plaintiff filed within the period permitted by Michigan Supreme Court administrative order 2020-18 on June 30th, 2020."

[6] Defendants also challenge the Governor's orders on many of the same grounds. But because the lower court relied on our orders, I will focus on those.

[7] *McDougall v Schanz*, 461 Mich 15, 27 (1999).

[8] *Gladych v New Family Homes, Inc*, 468 Mich 594, 600 (2003).

[9] *Id*. at 600-601.

[10] See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589-590 (2005).

[11] *Id*. at 590.

[12] 51 Am Jur 2d, Limitation of Actions, § 155, pp 603-604.

[13] Blanshard, A Treatise on the Statutes of Limitation (1826), p 162; see also *Hanger v Abbott*, 73 US 532, 541 (1867); Buswell, The Statute of Limitations and Adverse Possession (1889), § 127, pp 183-185; Gregory, *The Effect of War on the Operation of Statutes of Limitation*, 28 Harv L Rev 673, 673-674 (1915).

common explanation for this rule was that if the statute of limitations did not expressly provide for tolling for the closure of courts during a war, then a court had no place reading that exception into the statute.[14] Shortly after the Civil War, the Supreme Court of Arkansas followed a line of English cases holding "that, though the government was usurped, and the courts closed, the running of the statute of limitations was not affected; and the reason assigned was, that the statute contained no such exception . . . ."[15]

But this rule ultimately did not prevail. Another line of cases had, as early as 1805, reached the opposite result, holding that war could suspend statutes of limitations because alien enemies could not use our courts during hostilities.[16] In a deluge of cases following the Civil War, the United States Supreme Court acknowledged:

> Text writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the statute of limitations, but Plowden says that things happening by an invincible necessity, though they be against common law, or an act of Parliament, shall not be prejudicial. That, therefore, to say that the courts were shut, is a good excuse on voucher of record.[17]

The Court went on to hold that the statute of limitations would not bar the action when the courts were constructively closed during the Civil War. It explained that the "[a]bility to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt."[18] Rather, the actions of the government, over which the party had no control, suspended his remedy.[19] Or, as the Court elsewhere stated, " 'The law

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[14] See *Effect of War*, 28 Harv L Rev at 673-674 (discussing the English cases espousing this analysis).

[15] *Bennett v Worthington*, 24 Ark 487, 489 (1866), overruled by *Metro Nat'l Bank of New York City v Gordon*, 28 Ark 115 (1872); see also *id.* (discussing the caselaw).

[16] See —— *v Lewis's Executors*, 3 NC 346 (D NC, 1805); *Effect of War*, 28 Harv L Rev at 675 (discussing *Wall v Robson*, 2 Nott & McCord 498 (SC, 1820)).

[17] *Hanger v Abbott*, 73 US 532, 541 (1867); see also *Statute of Limitations and Adverse Possession* at § 128 (noting the same rule in English law).

[18] *Hanger*, 73 US at 540.

[19] *Id.*

imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other.' "[20]

The Court reaffirmed *Hanger* in numerous subsequent decisions, and state courts—including those in Arkansas—eventually followed suit.[21] The ultimate justification for these holdings was that the courts were closed to the plaintiffs. Most of the discussion in the cases focused on the reason for the closure, which was the principle that citizens of belligerents could not resort to enemy courts to enforce rights during war.[22] If the suit was between two individuals who, during the war, had access to the same courts, then the statutes of limitations continued to run.[23]

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[20] *Brown v Hiatts*, 82 US 177, 184-185 (1872) (citation omitted).

[21] See *Amy v Watertown*, 130 US 320 (1889); *Ross v Jones*, 89 US 576 (1874); *Brown*, 82 US at 184-185; *The Protector*, 79 US 700 (1871); *United States v Wiley*, 78 US 508 (1870); *Levy v Stewart*, 78 US 244 (1870); see also *Peters v McKay*, 195 Or 412, 431-432 (1951) (noting that "the great mass of federal and state decisions" support the view that the statute of limitations is suspended during war); *Siplyak v Davis*, 276 Pa 49, 54-55 (1923) (implying an exception to statutes of limitations during war when courts were inaccessible); *Ahnert v Zaun*, 40 Wis 622 (1876) (applying *Hanger* and its progeny); *Woods v Elliott*, 49 Miss 168, 180 (1873) (adopting *Hanger* and explaining that suspending the limitations period "commends itself to our adoption by its good sense, reason and justice"); *Metro Nat'l Bank*, 28 Ark at 117-118 (noting its former decision in *Bennett* but adopting the majority view); *Perkins v Rogers*, 35 Ind 124, 144-145 (1871) (adopting *Hanger*); see generally *War as Suspending Running of Limitations in Absence of Specific Statutory Provision to that Effect*, 137 ALR 1454, 1455, § 1(a) ("[I]t is now a firmly established principle of international law that the existence of a state of war between two countries or powers is effective to suspend the running of statutes of limitation as between the citizens of such countries or powers at war . . . ."); 66 Ohio Jur 3d, Limitations and Laches, § 88 ("The courts are without authority to enlarge or change those [exceptions to the limitations period] specified or to establish others. While it is true that in a few instances courts have made exceptions not found in the statute, they are only such as arise from a state of war or other imperative necessity as when the courts are shut or by act of law one party is forbidden to sue or the other is rendered incapable of being sued.").

[22] *Hanger*, 73 US at 540; see also *Peters*, 192 Or at 431-432.

[23] See, e.g., *McKinzie v Hill*, 51 Mo 303, 307-308 (1873) ("Missouri . . . courts were open. . . . It was not necessary that the court should be held to enable [the plaintiff] to pursue his remedy and avoid the bar of the statute. He might have filed his suit with the clerk of the court, and had

In light of this caselaw, it appears that equitable tolling is justified in these circumstances only for court closures or the inaccessibility of courts.[24] Our administrative orders went well beyond that because they were not limited to situations in which the courts were closed. Defendants thus raise a solid argument that we lacked any legal basis for tolling the statutes and that doing so usurped the Legislature's power.[25] While I voted for these orders along with the other members of the Court, that does not mean they should be immunized from prompt review. Time and reflection—which we did not have in abundance when the orders were issued—may reveal that we were wrong. Our initial orders were issued at a point when it was unclear whether and to what extent courts might close. Even so, as Justice Felix Frankfurter once said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[26] I would not reject defendant's arguments simply because the potential flaws in our orders have become apparent only now. This case presents an important issue that should be addressed promptly.[27] I would therefore remand this case to the Court of Appeals as on leave granted.

ZAHRA, J., joins the statement of VIVIANO, J.

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summons issued and served, and that would have been sufficient. There is no pretense that this course was not open to him."); *Zacharie v Godfrey*, 50 Ill 186, 194 (1869) (holding that where a Louisiana resident fled the Confederacy and remained in the Union during the war, he could have brought suit in Union courts and therefore the statutory limitations period continued to run against him).

[24] Maryland's highest court recently ruled that a similar court-issued order tolling statutes of limitations did not violate the separation of powers. See *Murphy v Liberty Mut Ins Co*, 478 Md 333 (2022). In that case, however, the court characterized the tolling order as "explicitly tied to the period that the courts were closed to the public." *Id*. at 369. Moreover, unlike Michigan, Maryland considers statutes of limitations to be procedural rather than substantive, and therefore its highest court has more authority to regulate limitations periods. *Id*. at 376.

[25] If they are correct, this would not be the only recent instance in which this Court's rulemaking has invaded the legislative sphere. See Amended Administrative Order No. 2020-17, 506 Mich lxxiv, lxxvii-lxxxii (2020) (VIVIANO, J., dissenting) (noting that our Court had, without proper authority, issued rules suspending statutes on landlord-tenant proceedings); see also Amendments of Michigan Court Rules 2.403, 2.404, and 2.405, 508 Mich clxi, clxxiii-clxxxiii (2021) (VIVIANO, J., dissenting) (noting that changes to our rules on the case evaluation process appeared to put our rules in direct conflict with statutes on the topic).

[26] *Henslee v Union Planters Nat'l Bank & Trust Co*, 335 US 595, 600 (1949) (Frankfurter, J., dissenting).

[27] To be sure, while the tolling orders might be invalid, particular plaintiffs who relied on those orders may argue that a court should

Leave to Appeal Denied September 14, 2022:

DAVIS v HIGHLAND PARK CITY CLERK, No. 164564; Court of Appeals No. 361544.

VIVIANO, J. (*concurring*). I agree with the denial order in this case because appellant Highland Park City Council lacks standing to appeal. I write, however, because the underlying legal issue has caused great confusion and resulted in numerous candidates being kept off the ballot. Statutory requirements for appearing on ballots must be followed, but those requirements should be clear and easy to understand. As shown by this case, the confusion caused by the recent amendment of MCL 168.558(2) threatened the democratic process by nearly depriving the city of Highland Park's legislative body of sufficient membership to govern. I strongly encourage the Legislature to correct this problem before the next election cycle.

Plaintiff Robert Davis brought the present case to challenge the eligibility of Carlton Clyburn, Jr., to be on the August 2022 primary ballot for Highland Park mayor. Like other local offices in Highland Park, the mayoral office is officially designated as nonpartisan. In seeking the office, Clyburn was required by MCL 168.558(2) to file an affidavit of identity (AOI). The AOI was required to contain, among other things, "the candidate's political party or a statement indicating no party affiliation if the candidate is running without political party affiliation[.]" The party-affiliation requirement was put in place in 2021. See 2021 PA 158.[1] The AOI form provided by the Secretary of State's office, however, predated this amendment and has not been updated. In the relevant space, the form asked for the following information: "political party, if a partisan office. if running without party affiliation list 'No Party Affiliation.' " Clyburn, like many other candidates running for nonpartisan office—including numerous judicial candidates—left this space blank, apparently in the belief that it was inapplicable to him because he did not have the option of running with party affiliation for the office of mayor.

Davis sought mandamus relief against the Highland Park City Clerk and the Highland Park Election Commission to keep Clyburn off the ballot, claiming that his AOI was defective under MCL 168.558(2)

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nonetheless equitably toll a limitations period. We have, in fact, indicated that equitable tolling can apply "when the courts themselves have created confusion." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 406 (2007). But that is a different question than the one presented here, i.e., whether we have the power to preemptively toll statutory limitations periods.

[1] 2021 PA 158 also added a number of other requirements regarding what an AOI must contain, but only the party-affiliation requirement is relevant for purposes of this appeal.

because it did not contain any statement that Clyburn was running without party affiliation. The Highland Park City Council (the City Council) was allowed to intervene as a defendant over plaintiff's objection. The trial court disagreed with plaintiff on the merits and denied mandamus, but the Court of Appeals reversed in an unpublished opinion. *Davis v Highland Park City Clerk*, unpublished opinion of the Court of Appeals, issued June 2, 2022 (Docket No. 361544). The Court of Appeals concluded that MCL 168.558(2) applied to candidates running for nonpartisan offices. Clyburn failed to comply with this provision because his silence on the form—i.e., his failure to state that he was running with no party affiliation—did not satisfy the statutory requirement that he "state something affirmatively . . . ." *Id*. at 4.

After the decision keeping him off the ballot, Clyburn attempted, for the first time, to intervene in this case—he had not been a party to the proceedings in either of the lower courts—and sought leave to appeal here. We denied this 11th-hour effort to intervene, as it came at a point when it seemed impossible to grant him the relief he sought, i.e., placement on the primary ballot, which the Secretary of State needed to certify by June 3. See MCL 168.552(14). We dismissed the application for leave to appeal, as no party to the case had, at that point, sought leave to appeal. About three weeks later, well after the date on which the Secretary of State was required to certify candidates for the August ballot, see MCL 168.552(14), the City Council filed the present application for leave to appeal, challenging the Court of Appeals' decision. In its application, the City Council notes that local officials kept numerous other candidates for the city's nonpartisan offices (not parties to this case) from the ballot because those candidates—10 of the 14 candidates, in fact—had, like Clyburn, failed to write on the AOI that they were running without party affiliation.

I believe a denial of leave is appropriate in this case because the City Council lacks appellate standing. A party can appeal if it is aggrieved from a decision by a lower court; that is, it "must have suffered a concrete and particularized injury" based on the decision below. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291 (2006). "A party who could not benefit from a change in the judgment has no appealable interest." *Id*. at 291 n 2 (quotation marks and citations omitted).

It is true, as Justice WELCH notes in dissent, that the City Council was allowed to intervene in this action below and took a position contrary to the conclusion reached by the Court of Appeals. But these facts do not supply an injury suffered by the City Council, and a judgment in this case reversing the Court of Appeals would not supply a benefit to the City Council. Because Clyburn is the only candidate plaintiff has challenged in this appeal, a decision from this Court could not now order the other candidates to be placed on the ballot. Those candidates are not parties here, nor do they appear to be in privity with the City Council—and it is not even clear whether they still desire to stand for office in the election. Cf. *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, 509 Mich 276, 282-289 (2022) (explaining the limited circumstances in which a nonparty can be bound by a judgment under the principles of res

judicata or collateral estoppel). For that reason, no decision in this case would prevent there being vacancies on the City Council resulting from local officials' removal of candidates for the council. And even so, the Highland Park City Charter provides the council with the power to fill vacancies, including (in some circumstances) by calling a special election. Highland Park Charter, § 4-13. Even with reduced numbers after the upcoming election, it appears the City Council will have a quorum to conduct business. *Id*. at § 5-3. Thus, I cannot see how the Court of Appeals' decision to keep Clyburn off the ballot has caused a sufficient injury to the City Council to provide it standing to appeal.

But while the City Council lacks standing to pursue this relief, it has raised a significant issue that deserves prompt attention. As Justice WELCH explains in her dissenting statement, numerous candidates for judicial office—which is nonpartisan—had their AOIs challenged, and at least one has been kept off the ballot as a result. The confusion did not start with these candidates—in fact, it appears the source of the confusion preceded the enactment of the relevant statutory language in 2021. Before the language was passed, the Bureau of Elections in August 2021 proposed a rule for AOIs that suggested that it needed this information—but only for partisan candidates. The proposed rule that would have required the candidate to provide the following:

> (e) If the candidate seeks nomination or election to a partisan office, he or she must include the following:
>
> (i) The name of the political party with which the candidate is affiliated.
>
> (ii) If seeking nomination or election to a partisan office without being affiliated with a political party, the candidate must indicate "no party affiliation" using these or similar words or phrases. [Mich Admin Code, Proposed R 168.3(1).]

As is plain from the text, the rule would have applied only to partisan offices, not the nonpartisan offices like Clyburn and others were seeking.

After the amendment of MCL 168.558(2) was passed in late 2021, the Bureau of Elections decided to drop its proposed rule because it would have been "redundant" given the new statutory language. Further, as noted in a letter to the Secretary of State from an administrative director in March 2022, officials involved in the rulemaking process concluded that the language in the statute was "similar" to that in the proposed rule and that "the statute accomplishes the same purpose as the original proposed language." Thus, the proposed rule was scotched. Notably, the Secretary of State's office did not update its AOI form after the amendment.

Turning to the text of MCL 168.558(2) and other relevant statutes, there was good reason for the Bureau of Elections' apparent belief that the new language applied only to candidates for partisan office. On one hand, the Court of Appeals was correct that the literal scope of the key phrase—"the candidate's political party or a statement indicating no party affiliation if the candidate is running without political party affiliation"—is broad enough to cover candidates for nonpartisan offices.

Such candidates do run without being affiliated with a political party. On the other hand, the broader statutory framework suggests that the Legislature used the phrase "without political party affiliation" to refer only to candidates running for partisan office or for this Court. In order to be placed on the ballot, such candidates must file a "qualifying petition," which is defined as "a nominating petition required of and filed by a person to qualify to appear on an election ballot as a candidate for office without political party affiliation." MCL 168.590(1). Critically, only candidates for partisan office or for this Court may file a qualifying petition. See MCL 168.590(2) ("A person may file a qualifying petition for a partisan office or office of justice of the supreme court. A filing fee shall not be tendered instead of a qualifying petition."). Thus, to appear on the ballot as "a candidate for office without political party affiliation," a candidate must file a qualifying petition, but the candidate can file that petition only for partisan offices and for the office of justice on this Court. It seems to follow that a candidate for a nonpartisan office *cannot* take the steps necessary to file as "a candidate for office without political party affiliation."[2] Instead of a qualifying petition, the Legislature has provided for a different nominating petition and a different primary for nonpartisan offices. MCL 168.544a.

In this manner, the Legislature appears to have distinguished between candidates for nonpartisan office and candidates for partisan office (or this Court) who are running without political party affiliation. The manner in which candidates gain access to the ballot differs for these two groups. Why, then, would MCL 168.558(2) nevertheless be read to require a candidate to list himself or herself as running "without political party affiliation"? Such a requirement could only cause confusion, as it would indicate to the officer receiving the affidavit—which is filed with the qualifying petition, see MCL 168.558(1)—that the candidate was seeking access to the ballot by filing a qualifying petition, which candidates for nonpartisan office cannot do. Moreover, the affidavit is part of the process for appearing on a ballot. But on the ballot, "the names of the several nonpartisan offices to be voted for shall be placed on a separate portion of the ballot containing no party designation . . . ." MCL 168.699. In other words, simply by filing for a nonpartisan office, a candidate is placed on the nonpartisan portion of the ballot where—given the nature of the type of office being sought—no partisan designation is even possible. Because the placement of a nonpartisan office is on an entirely separate section of the ballot where no party designation may appear, it makes little sense to require a candidate to designate on the affidavit that he or she is running without party designation. Such a separate designation does, however, make sense for partisan offices appearing on the partisan ballot. These offices will not be placed on the partisan primary ballot (which only involves candidates

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[2] As explained below, the office of justice on the Michigan Supreme Court is nonpartisan. This office was apparently nevertheless included in MCL 168.590 because candidates can be nominated by political parties.

from the major political parties), but will need to be specially shown on the general-election ballot as running without political party affiliation.

Thus, read in light of the full statutory framework, a strong argument could be made that the reference in MCL 168.558(2) to a "candidate . . . running without political party affiliation" pertains only to candidates for partisan offices and for this Court. A candidate running for a nonpartisan office is, by definition, incapable of running with political party affiliation for purposes related to placement on the ballot. It would therefore be redundant, at best, to require candidates for nonpartisan offices to state in the affidavit that they are running without political party affiliation. This conclusion finds support in the statutory context, which must be consulted when interpreting the scope of MCL 168.558(2) so that we can "make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ Hosps, Inc v Casey*, 499 US 83, 101 (1991).[3]

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[3] Justice WELCH has offered other reasons for this conclusion concerning MCL 168.558(2), including additional ways the statutes distinguish between partisan and nonpartisan offices. See, e.g., MCL 168.540 (providing that nonpartisan primary elections will not be held "[i]f, upon the expiration of the time for filing petitions for any nonpartisan primary election, it shall appear that as to any office on any nonpartisan ticket there are not to exceed twice the number of candidates as there are persons to be elected"). I question, however, her interpretation of MCL 168.550. That provision states:

> No candidate shall have his name printed upon any official primary election ballot of any political party in any voting precinct in this state unless he shall have filed nominating petitions according to the provisions of this act, and all other requirements of this act have been complied with in his behalf, except in those counties qualifying candidates upon the payment of fees.

Justice WELCH has observed that this language indicates that candidates for *nonpartisan* office cannot be kept off the ballot by failing to comply with the AOI requirement at issue here. *Davis v Highland Park City Clerk*, 509 Mich 1029, 1029 (2022) (WELCH, J., dissenting). This conclusion may prove too much, as it might suggest that a nonpartisan candidate's failure to comply with any statutory requirement is not grounds for keeping him or her from the ballot. Moreover, MCL 168.558 includes its own provision on the consequences of noncompliance in Subsection (4), which appears to indicate that a noncomplying candidate cannot be certified for the ballot. See MCL 168.558(4) ("An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section . . . ."). In any event, I agree with Justice WELCH that the overall statutory framework is confusing and merits examination.

Finally, because I believe the Legislature should revisit and clarify this statute, it is worth noting another wrinkle that has become apparent with regard to candidates for this Court. This office is somewhat anomalous in that it is nonpartisan but candidates can receive nominations by political parties. See Const 1963, art 6, § 2; MCL 168.392. Incumbent justices are entitled to placement on the ballot if they file an affidavit of candidacy. Const 1963, art 6, § 2; MCL 168.392a. All candidates appear on the nonpartisan section "containing no party designation . . . ." MCL 168.393. In this context, particularly because of the party nominations, it is clear why the Legislature might have thought it advisable to treat unaffiliated candidates for this Court together with unaffiliated candidates for partisan offices. Both types of candidates need an alternative way to gain access to the ballot since they do not have the option of gaining access to the ballot through either a partisan or nonpartisan primary. But, especially in light of the confusion surrounding MCL 168.558(2), this statutory framework raises concerns about how candidates for this Court are to fill out their AOIs. These candidates seek a nonpartisan office, yet MCL 168.590 suggests that they must comply with the requirement in MCL 168.558(2) that they provide a statement that they are running without party affiliation. This would appear to be contrary to the Bureau of Elections' apparent position that the party-affiliation requirement only applies to candidates for partisan office.[4] If the requirements applicable to candidates for this office are to differ from the requirements applicable to all other candidates for nonpartisan offices, the Legislature should make that clearer in the statute.[5]

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[4] Either way, it presents a conundrum for candidates for Supreme Court justice in light of the possible ways in which candidates for this Court may file and run for office. A statement of "no party affiliation" would be somewhat misleading, since such candidates may seek a partisan nomination and, at least to that extent, may be thought of as having some affiliation with a political party. But, if read as requiring a candidate to state a party affiliation in order to make clear that the candidate does not intend to file a qualifying petition, such a statement would also be somewhat misleading. After being nominated by a party, candidates for Supreme Court justice run without a party designation on the nonpartisan section of the ballot, and the judicial canons closely regulate the political conduct of judges and candidates for judicial office. See, e.g., Code of Judicial Conduct, Canon 7(A) (prohibiting judges or judicial candidates from holding any office in a political party or making speeches on behalf of or endorsing a nonjudicial candidate, but allowing them to attend political gatherings and contribute to a political party).

[5] Further, to the extent it suggests that all candidates for this office must file a qualifying petition, MCL 168.590 arguably runs afoul of Const 1963, art 6, § 2, which allows incumbent justices to be placed on the ballot by simply filing an affidavit of candidacy. The qualifying-

For these reasons, while I concur in the denial order here, there remains much work to be done in this area. And because the statute is unclear—perhaps verging on true ambiguity—the best course is for the Legislature to clarify its intent.

WELCH, J. (*dissenting*). I write separately to express my continued dissatisfaction with how this case was resolved on the merits. I dissented from the Court's June 7, 2022 order denying Carlton Clyburn, Jr.'s[1] motion to intervene and to dismiss his application for leave to appeal in Docket No. 164490. *Davis v Highland Park City Clerk*, 509 Mich 1029, 1029 (2022) (WELCH, J., dissenting). The concerns I raised in June remain unresolved. I continue to question whether mandamus relief was properly granted in this case, because it remains unclear to me that there was a clear legal mandate, as a matter of law, for the affected candidates to explicitly declare "no party affiliation" on the affidavit of identity (AOI) required by MCL 168.558 given that the candidates were not seeking partisan office and there was no partisan primary within the jurisdiction at issue. Compare MCL 168.558(2), (4) with MCL 168.550. In fact, the lack of clarity regarding how to properly fill out an AOI for nonpartisan candidates seems evident given the fact that at least six different judicial candidates seeking nonpartisan office also had their AOIs challenged or called into question on the basis that they had improperly filled out the document. See, e.g., *Belcoure v Benson*, unpublished order of the Court of Claims, entered August 19, 2022 (Case No. 22-000111-MB) (granting mandamus relief and ordering that judicial candidate Roney Haywood be removed from the ballot because he left the declaration-of-party-affiliation line on his AOI blank); *Davis v Benson*, unpublished order of the Court of Claims, entered September 2, 2022 (Case No. 22-000125-MM) (denying mandamus relief and holding that LaKena Crespo's statement of "N/A" satisfied the declaration-of-party-affiliation requirement in MCL 168.558(2)); *Slavens v Benson*, unpublished order of the Court of Claims, entered September 2, 2022 (Case No. 22-000141-MZ) (granting declaratory relief keeping incumbent Judge Slavens on the ballot because his AOI was filed before the amendment of MCL 168.558(2) requiring a declaration of party affiliation took effect and evidence showed that two copies had been filed with the Secretary of State); *Fresard v Benson*, unpublished order of the Court of Claims, entered September 2, 2022

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petition process, by contrast, requires the collection of numerous signatures from across the state. MCL 168.590b. For incumbents, at least, it is hard to see how the qualifying-petition process squares with the Constitution. It seems, therefore, that the best reading of MCL 168.590 is that it applies to candidates for this office who are not incumbents and who were not nominated by a party.

[1] Clyburn is one of several prospective candidates who were disqualified from appearing on the November 2022 election ballot in the city of Highland Park as a result of a lower court's decision in this case. Clyburn is currently a member of the Highland Park City Council who decided to run for mayor rather than seek reelection as a councilperson.

(Case No. 22-000143-MZ) (applying laches as a basis not to order removal of three incumbent judicial candidates from the ballot despite their having left the declaration-of-party-affiliation line blank on their AOIs).

There are many ways in which the Michigan Election Law, MCL 168.1 *et seq*., treats elections for partisan offices differently from elections for nonpartisan offices, and it is unclear how MCL 168.558(2) and (4) interact with these other areas of the Election Law. For example, MCL 168.540 provides:

> If, upon the expiration of the timing for filing petitions for any nonpartisan primary election, it shall appear that as to any office on any nonpartisan ticket there are not to exceed twice the number of candidates as there are persons to be elected, then the officer with whom such petitions are filed shall certify to the proper board of election commissioners the names of such candidates whose petitions have been properly filed and such candidates shall be the nominees for such offices and shall be so certified. As to such offices, there shall be no primary election and such offices shall be omitted from the primary ballot.

Moreover, it is far from clear whether the requirement in MCL 168.558(2) that a candidate state "no party affiliation if the candidate is running without political party affiliation," such as running as an independent in an election for partisan office, is the same thing as a candidate who cannot run with a stated party affiliation as a matter of law, such as a candidate for a judgeship or another nonpartisan elected office. Accordingly, I continue to question whether there was a clear legal duty for the local clerk to disqualify Clyburn or other similarly situated candidates from the ballot for this election cycle and whether such a duty was ministerial in nature. See *Davis*, 509 Mich at 1029 (WELCH, J., dissenting).

I also disagree with plaintiff's arguments that the Highland Park City Council (the Council) does not have standing to seek review the Court of Appeals' ruling. "In order to have appellate standing, the party filing an appeal must be 'aggrieved.' " *Manuel v Gill*, 481 Mich 637, 643 (2008). See also Const 1963, art 6, § 1.

> An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Manuel*, 481 Mich at 643-644, quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292 (2006)].

"A party who could not benefit from a change in the judgment has no appealable interest." *Manuel*, 481 Mich at 644 (quotation marks and

citations omitted). This suggests that a party who could benefit from a change does have an appealable interest. We have recognized that even a party that prevailed in the Court of Appeals can have an appealable interest if a change in the final judgment would benefit that party. *Id*. at 643-645. In *Manuel*, the Court of Appeals had affirmed dismissal of the plaintiffs' contract claim on different grounds, but the Court of Appeals further held that the dismissal would be without prejudice to the contract claim being filed anew in the Court of Claims in a new lawsuit. *Id*. at 644-645. We held that a change in the Court of Appeals judgment, such as reinstating dismissal with prejudice, could benefit the defendant, and thus the defendant had appellate standing. *Id*. at 645.

In this case, from a procedural standpoint, the Council was permitted to intervene in the trial court over plaintiff's objection, but plaintiff did not appeal that ruling. The trial court denied plaintiff's request for mandamus relief, and thus plaintiff was an aggrieved party entitled to an appeal by right under MCR 7.203(A). The Council was the only party that participated in the proceedings before the Court of Appeals as an appellee defending the trial court's denial of mandamus relief; neither of the named defendants filed briefs in the Court of Appeals. The Court of Appeals reversed the trial court and granted plaintiff the mandamus relief he sought as to Clyburn. *Davis v Highland Park City Clerk*, unpublished per curiam opinion of the Court of Appeals, issued June 2, 2022 (Docket No. 361544). The Court of Appeals, as a result, directed the trial court to instruct the Highland Park City Clerk and the Highland Park Election Commission "to not place Clyburn on the ballot for the August 2022 primary election for Mayor of Highland Park." *Id*. at 4. This occurred even though there was never going to be a primary election in the city because there were not more than twice the number of candidates as there were vacancies for the office of mayor. See Highland Park City Charter, § 12-5; MCL 168.540. Within a week of the Court of Appeals' decision, Clyburn filed a motion to intervene as an appellant before this Court and filed a proposed application for leave to appeal. The Court denied Clyburn's request to intervene and dismissed his application over my dissent. *Davis*, 509 Mich 1029. The Council then filed a timely application for leave to appeal in this Court, but the Council did not request expedited review, nor did it request a decision by a specific date.

Following the Court of Appeals' ruling, several other candidates for nonpartisan offices within Highland Park were decertified from the ballot for having made the same alleged mistakes as Clyburn.[2] The

[2] While it is understandable for our courts to expect candidates whose candidacy is adversely affected by a legal determination to retain counsel and take legal action to defend their position on the ballot, this Court's previous denial of Clyburn's request to intervene in this case as an appellant, despite the Court of Appeals ordering that he be removed from the ballot, could have discouraged other nonpartisan Highland Park candidates who were disqualified from the ballot as a result of the Court of Appeals' decision from seeking relief through litigation.

Council has informed us that because of this, there will not be enough potential candidates on the ballot to fill the vacancies on the Council to a level that would provide the Council with the quorum necessary to conduct official business and that other offices within the city might go unfilled. While the Council was not the direct subject of the mandamus relief that was granted, the legal effect of the Court of Appeals' decision has led to an untenable situation in which the elected legislative body of the City may lack sufficient membership to form a quorum and conduct official city business. A timely reversal of the Court of Appeals' judgment could result in the previously disqualified candidates being reinstated before the ballots for the November election are printed. This, in turn, would ensure that the Council, as a governmental body, will have enough members to conduct official business following the November election. The Council does stand to benefit from a change in the Court of Appeals' judgment, and therefore, it is my belief that the Council has appellate standing to seek leave to appeal as an aggrieved party.

For these reasons, I respectfully dissent from the Court's order.

BERNSTEIN, J., joins the statement of WELCH, J.

DAVIS v SECRETARY OF STATE, No. 164778; Court of Appeals No. 362841.

Oral Argument Ordered on the Application for Leave to Appeal September 16, 2022:

In re CARLSEN ESTATE, No. 164084; reported below: 339 Mich App 483. On order of the Court, the application for leave to appeal the December 16, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether the Court of Appeals correctly determined when the appellee's contingent claim against the estate arose for purposes of MCL 700.3803(2).

The Probate and Estate Planning Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 16, 2022:

CARLSEN v SOUTHWESTERN MICHIGAN EMERGENCY SERVICES, PC, No. 163750; reported below: 338 Mich App 678.

CAVANAGH, J. (*concurring*). I concur in the order denying leave to appeal, but write to clarify one aspect of the Court of Appeals opinion. In this case, plaintiffs sued after the death of their seven-month-old daughter. During voir dire, defense counsel exercised a peremptory challenge against the only Black person on the panel. The prospective juror was also six and a half months pregnant. Plaintiff raised a challenge under *Batson v Kentucky*, 476 US 79 (1986), pointing out that defense counsel was excluding the only Black person on the panel. Defense counsel denied that the prospective juror was being excluded

because of her race, stating, "It's really simple. . . . She's pregnant." Plaintiff's counsel responded that that could also be discriminatory because only women can become pregnant. Defense counsel clarified the rationale was more precisely that the prospective juror was an expectant parent. Defense counsel explained that because the case involved the death of an infant, their strategy was to exclude prospective jurors who were parents of young children, regardless of the gender of the juror. The trial court accepted defense counsel's explanation as rational and nondiscriminatory.

"A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender." *People v Bell*, 473 Mich 275, 293 (2005) (opinion by CORRIGAN, J.). See also *JEB v Alabama ex rel TB*, 511 US 127 (1994). The opponent of a peremptory challenge must first make a prima facie showing of discrimination by establishing that:

> (1) [the prospective juror] is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*People v Knight*, 473 Mich 324, 336 (2005).]

If the prima facie showing is made, the burden shifts to the proponent of the peremptory challenge to articulate a nondiscriminatory explanation. *People v Kabongo*, 507 Mich 78, 89 (2021) (opinion by ZAHRA, J.). Finally, the court must determine whether the explanation is mere pretext. *Knight*, 473 Mich at 337-338.

I disagree with the Court of Appeals' suggestion that the prospective juror was properly excluded because she would decide the case based on her emotion rather than logic. Excluding pregnant women as a class on the basis that they could not be impartial would fall into exactly the trap the United States Supreme Court has warned of: "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.' " *JEB*, 511 US at 138 (citation omitted). However, I concur in the denial of leave to appeal because the defendant's explanation of excluding parents of young children makes sense in the context of this trial and does not run afoul of *Batson*. Further, there is evidence in the record to support this explanation because all but one of the prospective jurors were asked whether they had children and the ages of their children.

WELCH, J., joins the statement of CAVANAGH, J.

CLEMENT, J. (*dissenting*). I would not deny leave and would instead remand to the Court of Appeals for it to consider whether our ruling in *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398 (2022), construing the phrase "because of . . . sex" in MCL 37.2302(a), should inform its interpretation of the phrase "on the basis of . . . sex" in MCR 2.511(F)(1).

PEOPLE V FLORES-CHINCHILLA, No. 164761; Court of Appeals No. 362626.

Summary Disposition September 21, 2022:

PEOPLE v RYANS, No. 163653; Court of Appeals No. 355427. By order of December 22, 2021, the prosecuting attorney was directed to answer the application for leave to appeal the September 23, 2021 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the July 17, 2020 and the July 20, 2020 orders of the Cass Circuit Court and we REMAND this case to that court. On remand, the trial court shall reconsider the defendant's request to file a notice of insanity and his request for an examination at the Center for Forensic Psychiatry pursuant to MCL 768.20a(2) and MCL 768.21a(1). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v LEE, No. 163945; Court of Appeals No. 352309. On order of the Court, the application for leave to appeal the November 18, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the judgment of the Court of Appeals concluding that no prejudice resulted from trial counsel's deficient performance in failing to object when the defendant's son impermissibly opined on the defendant's credibility, and we REMAND this case to that court for reconsideration of that ineffective assistance of counsel claim. Although the Court of Appeals cited the correct standard for assessing prejudice under *Strickland v Washington*, 466 US 668 (1984), it failed to apply that standard. The defendant was not required to show that, but for counsel's deficient performance, there was insufficient evidence to sustain his convictions. Rather, prejudice is established where a defendant shows that "but for counsel's deficient performance, there is *a reasonable probability* that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012) (emphasis added). On remand, the Court of Appeals shall resolve the defendant's claim of ineffective assistance of counsel under this standard. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v GREEN, No. 164279; Court of Appeals No. 359758. By order of May 13, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the February 16, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. We further ORDER that the stay entered by this Court on May 13, 2022, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied September 21, 2022:

DOSTER v COVENANT MEDICAL CENTER, INC, Nos. 162702 and 162703; Court of Appeals Nos. 349560 and 350941.

PEOPLE v BESSNER, No. 163212; Court of Appeals No. 350141.

CAVANAGH, J. (*concurring*). I concur in the order denying leave to appeal. I write separately only to note that defendant has made allegations regarding jury selection, but has not made any offer of proof in support of these allegations. Such an offer might be considered in a motion for relief from judgment.

JACOBSON v HORNBECK, Nos. 163492 and 163493; Court of Appeals Nos. 352976 and 353862.

PEOPLE v KLAGES, No. 164076; reported below: 339 Mich App 610.

PEOPLE v DZIUBA, No. 164208; Court of Appeals No. 353828.

PEOPLE v ROBERT LEWIS, Nos. 164228 and 164229; Court of Appeals Nos. 355830 and 355834.

CAVANAGH, J. (*concurring*). I agree with the Court's order denying leave to appeal. It is premature for this Court to address defendant's motion to remand, as the case call panel of the Court of Appeals could still grant him that relief. This order should not be understood as expressing any opinion on the merit of defendant's argument that a remand for an evidentiary hearing is necessary to appropriately resolve his claim on appeal. See, e.g., *People v Poole,* 497 Mich 1022, 1022 (2015) ("[O]rders denying leave to appeal [are] not rulings on the merits of the issues presented."), citing *Grievance Administrator v Lopatin*, 462 Mich 235, 260 (2000).

PEOPLE v BERRY, No. 164232; Court of Appeals No. 355479.

PEOPLE v MIX, No. 164287; Court of Appeals No. 360469.

SWIFT v EVANS, No. 164336; Court of Appeals No. 359417.

Reconsideration Denied September 21, 2022:

LAKESHORE GROUP v STATE OF MICHIGAN, No. 159033; Court of Appeals No. 341310.

ROWLAND v INDEPENDENCE VILLAGE OF OXFORD, LLC, No. 161007; Court of Appeals No. 345650.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

In re BABY BOY DOE, No. 163807; reported below: 344 Mich App 82.

Rehearing Denied September 21, 2022:

PEOPLE v BOYKIN, No. 157738; Court of Appeals No. 355862.

COMERICA, INC v DEPARTMENT OF TREASURY, No. 161661; reported below: 332 Mich App 155.

PEOPLE v CHRISTIAN, No. 162354; Court of Appeals No. 348807.

Leave to Appeal Granted September 23, 2022:

PUEBLO v HAAS, No. 164046; Court of Appeals No. 357577. On order of the Court, the application for leave to appeal the December 28, 2021 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) whether, in light of *Obergefell v Hodges*, 576 US 644 (2015), the equitable parent doctrine should be extended to provide standing to persons such as the plaintiff, who, at the time of the parties' same-sex relationship, was not permitted by Michigan law to legally marry the defendant, and if so, (2) what the parameters of that extension should be. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. The Family Law Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal September 23, 2022:

PEOPLE v WARNER, No. 163805; reported below: 339 Mich App 125. On order of the Court, the application for leave to appeal the October 7, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether, under MCL 767.29 and MCR 6.112(H), a trial court may amend an information, over objection, to include a charge that was dismissed pursuant to an order of *nolle prosequi*, without beginning the proceedings anew, "unless the proposed amendment would unfairly surprise or prejudice the defendant," MCR 6.112(H); (2) if so, whether the Eaton Circuit Court erred by doing so in this case and whether any error was harmless; and (3) whether the trial court abused its discretion by denying the defendant's motion to appoint an expert in false confessions.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

ZWIKER v LAKE SUPERIOR STATE UNIVERSITY, HORRIGAN v EASTERN MICHIGAN UNIVERSITY, and DALKE v CENTRAL MICHIGAN UNIVERSITY, Nos. 164213, 164214, and 164215; reported below: 340 Mich App 448. On order of the Court, the application for leave to appeal the February 10, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether the plaintiffs are entitled to any reimbursement for payments made to the defendants for tuition, room and board, or any associated fees or costs for the winter/spring 2020 semester.

The total time allowed for oral argument shall be 60 minutes: 30 minutes for the appellants, to be divided at their discretion, and 30 minutes for the appellees, to be divided at their discretion. MCR 7.314(B)(2).

PEOPLE v MONTEZ, No. 164243; Court of Appeals No. 353119. On order of the Court, the application for leave to appeal the March 10, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether references to acquitted conduct in the defendant's presentence investigation report (PSIR) violated his right not to be sentenced on the basis of conduct of which he was acquitted, as articulated in *People v Beck*, 504 Mich 605 (2019); and (2) whether the defendant's trial attorney rendered ineffective assistance by failing to object to the references to acquitted conduct in the PSIR.

We further ORDER the Kent Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Motion to Add Issue Granted September 23, 2022:

PEOPLE v THOMPSON, No. 163224; Court of Appeals No. 344834. By order of December 22, 2021, the Clerk was directed to schedule oral argument on the application for leave to appeal the May 6, 2021 judgment of the Court of Appeals. Following the issuance of that order, the defendant-appellant filed a motion to add an issue to his application for leave to appeal. The motion to add issue is considered, and it is GRANTED. In addition to the issues the appellant was ordered to address at oral argument, the parties shall also address whether the defendant is entitled to resentencing pursuant to *People v Parks*, 510 Mich 225 (2022). Briefing on this case will be pursuant to the schedule set forth in MCR 7.312(E) and will run from the date of this order.

Leave to Appeal Denied September 23, 2022:

PEOPLE v COVEY, No. 161869; Court of Appeals No. 353243. On order of the Court, the application for leave to appeal the July 13, 2020 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to remand is DENIED.

CAVANAGH, J. (*dissenting*). I dissent from this Court's order denying leave and would have granted leave to appeal. This case concerns a matter of critical importance to our state's jurisprudence under MCR 7.305(B)(3)—whether the state has jurisdiction to criminally prosecute tribal citizens for crimes allegedly committed on tribal land. Here, the question is whether defendant, a member of the Little Traverse Bay Bands of Odawa Indians (the Tribe), committed the crimes in question[1] on tribal land.[2] See *McGirt v Oklahoma*, 591 US ____, ____; 140 S Ct 2452, 2459 (2020) (holding that state courts generally have no jurisdiction to try Indians for conduct committed in "Indian Country"). Whether the crimes took place on tribal land turns on whether the governing agreement between the Tribe and the federal government—the Treaty of 1855[3]—established an Indian reservation and, if so, whether Congress subsequently disestablished it.

To be sure, the case presents complex questions of federal law and treaty interpretation with grave implications for tribal and state sovereignty. And the federal courts that have considered this question have rejected the Tribe's position.[4] But this area is not exclusively within the

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[1] Defendant pleaded guilty to charges of malicious destruction of property (MDOP) between $1,000 and $20,000 and felonious assault. The Major Crimes Act, 18 USC 1153(a), states that jurisdiction over any Indian who commits "a felony assault under [18 USC 113]" against "another Indian or other person" is "within the exclusive jurisdiction of the United States," and 18 USC 113(a)(3) provides that an assault with a dangerous weapon is punishable as a felony. It seems clear, and the parties agree, that the felonious-assault charge falls under the act. The attorney general concedes, arguendo, the same for the MDOP charge.

[2] Specifically, the crimes were committed near Petoskey, in Emmet County. Defendant and the Tribe, as amicus curiae, claim that an area of nearly 350 square miles on the tip of the northern Lower Peninsula —including Harbor Springs, Petoskey, Garden Island, High Island, and parts of Charlevoix, Charlevoix County, and Emmet County—is tribal land.

[3] Treaty With Ottowas and Chippewas, July 31, 1855, 11 Stat 621 (also known as the Treaty of Detroit).

[4] The Tribe (amicus here) filed a separate federal lawsuit against the state. The federal district court ruled that there was no reservation (not reaching the disestablishment question), the United States Court of

purview of federal courts,[5] and the jurisdiction of our own state courts over Michigan citizens who are also tribal citizens is axiomatically within our wheelhouse. See *People v Gillam*, 479 Mich 253, 261 (2007).

Resolution of the jurisdiction issue has significant implications for the state's criminal jurisprudence. If the area in question is a reservation, then, absent express jurisdiction granted by Congress, it is generally the Tribe, and not the state, that can properly exercise criminal

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Appeals for the Sixth Circuit affirmed, and the Supreme Court of the United States denied certiorari. *Little Traverse Bay Bands of Odawa Indians v Whitmer*, 398 F Supp 3d 201 (WD Mich, 2019), aff'd 998 F3d 269 (CA 6, 2021), cert den 595 US ___; 142 S Ct 1206 (2022). While certainly persuasive, decisions of the lower federal courts are not binding on this Court, *Abela v Gen Motors Corp*, 469 Mich 603, 606-607 (2004), and a denial of certiorari is not a binding decision on the merits, see *Huber v New Jersey Dep't of Environmental Protection*, 562 US 1302, 1302 (2011) (Alito, J., concurring).

[5] Other state courts have decided tribal boundary issues as well. In *State v Perank*, 858 P2d 927 (Utah, 1992), the Utah Supreme Court considered questions of the establishment of the Uintah-Ouray Reservation, despite parallel federal litigation in the United States Court of Appeals for the Tenth Circuit. See *Ute Indian Tribe v Utah*, 773 F2d 1087 (CA 10, 1985) (en banc) (1986). The Utah Supreme Court held that the reservation had been disestablished, disagreeing with the Tenth Circuit decision, which had held that neither the Uintah-Ouray Reservation nor the adjacent Uncompahgre Reservation had been disestablished or diminished. See also *Martinez v State*, 502 P3d 1115, 1117 (Okla Crim App, 2021) (considering, postconviction, whether a crime had been committed on the Kiowa Comanche Apache Reservation and whether Congress had disestablished the reservation); *State v Lawhorn*, 499 P3d 777, 778 (Okla Crim App, 2021) (considering whether the Quapaw Nation Reservation is Indian Country); *Lavallie v Jay*, 963 NW2d 287 (ND, 2021) (holding that the state court lacked subject-matter jurisdiction over a civil action regarding a vehicular crash because the crash had occurred on off-reservation land held in trust for the Turtle Mountain Band of Chippewa Indians); *Martin v State*, 969 NW2d 361, 362 (Minn, 2022) (rejecting a tribal jurisdiction claim because, unlike Oklahoma, Minnesota is one of the states granted jurisdiction to prosecute offenses by or against Indians on Indian Country under 18 USC 1162(a)); *Wolfe v Payne*, 622 SW3d 625 (Ark, 2021) (rejecting a tribal jurisdiction claim because crimes were committed off-reservation); *State v Twist*, unpublished per curiam opinion of the Arizona Court of Appeals, issued November 30, 2021 (Docket No. 1 CA-CR 21-0215 PRPC) (rejecting a tribal jurisdiction claim because reasonable evidence supported a finding that the crime occurred outside Indian Country).

jurisdiction over all Indians committing crimes therein. See 25 USC 1301(2); *McGirt*, 591 US ____; 140 S Ct at 2459 (noting that state courts generally have no jurisdiction to try Indians for conduct committed in "Indian Country"). In addition, if the area in question is a reservation, the Tribe could exercise limited criminal jurisdiction, known as "special domestic violence criminal jurisdiction," over non-Indians who commit specifically defined acts of domestic violence against Indians. 25 USC 1304. Whether and when tribes may prosecute crimes committed by and against their tribal citizens is fundamental to the state's recognition of tribes as equal sovereigns.[6]

This case also has implications for contexts beyond criminal jurisdiction. Chief among them, and vitally important to the relationship between our state and tribal courts, is the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. ICWA provides that tribal courts maintain exclusive jurisdiction over Indian children domiciled or residing in a reservation in the context of matters such as the termination of parental rights, adoption, and foster-care placement. 25 USC 1901 through 1963; 25 USC 1911(a) and (b). Actions commenced in state court must be transferred to tribal court, absent good cause. 25 USC 1911(b). The existence and extent of reservation boundaries therefore affect the lives of tribal children and their families. In addition, the boundaries of a reservation affect tribal governments' ability to enact and enforce laws regarding land use, taxation of Indians and non-Indians, zoning, administrative and regulatory matters, and economic issues, among others. Miller & Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 BU L Rev 2049, 2093 (2021). Tribes may also work with the Environmental Protection Agency to establish environmental standards that may be applied to persons within the entire reservation area, regardless of tribal membership. *Id*. at 2093, 2096. Other federal laws concerning the Tribe's cultural and spiritual heritage, such as the Native American Graves Protection and Repatriation Act (NAGPRA), the Archaeological Resources Protection Act, and the National Historic Preservation Act, are also implicated.[7] *Id*. at 2095-2096. The consequences for the Tribe and its members are great.[8] No less important are the perspectives of the state and the 18 municipalities and groups who intervened in the

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[6] And should this Court conclude that there was a reservation, four other federally recognized successor tribes to the signatories of the Treaty of 1855 may have similar claims. The treaty also addressed lands near, for example, Cheboygan and Sault Ste. Marie.

[7] The NAGPRA, for example, provides protections for tribal ancestor remains, funerary items, and sacred objects located on federal and tribal lands. See 25 USC 3001 *et seq*.

[8] See Little Traverse Bay Bands of Odawa Indians, *Tribal Chairperson's Statement Regarding Reservation Litigation* (March 8, 2022) <https://ltbbodawa-nsn.gov/archive/tribal-chairpersons-statement-regarding-reservation-litigation/> (accessed September 20, 2022) [https://perma.cc/X4QB-QX5P] (explaining that gaining legal affirma-

federal case (and appear together as amici here)—further stressing the significance of the case to the state's jurisprudence.

As a result of the *McGirt* decision, which recognized the continued existence of the Muscogee (Creek) Reservation in Oklahoma, the tribes, state, and localities in Oklahoma will have to grapple with many far-reaching and important issues in the years and decades to come. The stakes are equally high for our citizens, with frictions likely to arise in light of the federal courts' rejection of the Tribe's claims as well as this Court's refusal to meaningfully review the jurisdictional issue. While I do not take a position on the merits,[9] I recognize that agreeing with defendant and the Tribe would necessarily create a conflict with the Sixth Circuit decision. But resolving conflicts between the federal appellate courts and state courts is the role of the Supreme Court of the United States, see Sup Ct Rule 10, and that mere possibility should not scare us off—especially when what is at issue is no less than whether our nation has kept its promises to the Tribe. Because I believe that denying this application, without further consideration, abdicates our responsibility to decide an issue of critical importance to our state, I dissent.

PEOPLE v WATTS, No. 164785; Court of Appeals No. 360896. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the August 31, 2022 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Leave to Appeal Denied September 27, 2022:

GRIEVANCE ADMINISTRATOR v COMBS, No. 164263.

Summary Disposition September 28, 2022:

PEOPLE v HEATH, No. 163679; Court of Appeals No. 350430. On order of the Court, the application for leave to appeal the August 26, 2021

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tion of the reservation boundaries in the Treaty of 1855 would "honor our history and increase our services to our citizens, and protection of our children, elders, lands and waters").

[9] In its petition for certiorari, the Tribe argued that the Sixth Circuit's decision conflicts with precedent from the United States Supreme Court and other circuits, ignores the text of the treaty that specifically referenced the disputed lands as "reservations" and described them as "'*reserved* . . . for the band[s],'" and impermissibly requires evidence of active federal superintendence of the land to establish a reservation. Petition for Writ of Certiorari, *Little Traverse Bay Bands of Odawa Indians v Whitmer*, Docket No. 21-769 (CA 6, November 19, 2021), pp 16-32.

judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals judgment addressing the admission of other-acts evidence, and we REMAND this case to that court for reconsideration in light of *People v Denson*, 500 Mich 385 (2017), and *People v Golochowicz*, 413 Mich 298, 310-312 (1982). See *People v Chandler*, 502 Mich 879 (2018).

The prosecutor argued in the trial court that the other-acts evidence was relevant to prove a common plan or scheme. However, merely reciting a proper purpose for admitting other-acts evidence is insufficient to support admission of such evidence. *Denson*, 500 Mich at 400. Rather, courts must "closely scrutinize" whether that evidence is logically relevant to the alleged proper purpose. *Id*. In this case, the other-acts evidence was not logically relevant to prove a common plan or scheme, as it was undisputed that the alleged offense occurred. See *People v Sabin (After Remand)*, 463 Mich 43, 63 (2000) (explaining that "evidence of similar misconduct is logically relevant *to show that the charged act occurred* where the uncharged misconduct and the charged offense are sufficiently similar to support *an inference that they are manifestations of a common plan, scheme, or system*") (emphasis added). Instead, the only possible logically relevant proper purpose for the admission of this evidence was to prove identity, i.e., that defendant was the one who committed the charged offense. "*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a *modus operandi theory* to prove *identity*." *People v VanderVliet*, 444 Mich 52, 66 (1993).

On remand, the Court of Appeals shall apply *Golochowicz* to determine whether the other-acts evidence was admissible to prove identity. The Court of Appeals shall consider whether the defendant's other act and the charged offense were sufficiently similar to support this theory of relevance. See *Denson*, 500 Mich at 402-403. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v PETTERSCH, No. 164402; Court of Appeals No. 360413. On order of the Court, the application for leave to appeal the April 1, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

ZAHRA, J., would deny leave to appeal.

Oral Argument Ordered on the Application for Leave to Appeal September 28, 2022:

MARION v GRAND TRUNK WESTERN RAILROAD COMPANY, No. 164298; reported below: 341 Mich App 65. On order of the Court, the application for leave to appeal the March 10, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether: (1) the defendants were entitled to presume that the plaintiff would

leave the tracks before being struck by the train; (2) the defendants possessed a duty to slow or stop the train to avoid a possible collision with the plaintiff; and (3) if both of the preceding questions are answered in the affirmative, at what point does the entitlement to a presumption that a person will leave the tracks give way to the duty to act to avoid a possible collision, if at all. See *Lake Shore & MSR Co v Miller*, 25 Mich 274, 278-279 (1872), overruled on other grounds, *Bricker v Green*, 313 Mich 218 (1946).

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the defendants, to be divided at their discretion, and 20 minutes for the plaintiff. MCR 7.314(B)(2).

The Negligence Law Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

In re FORFEITURE OF 2006 SATURN ION, No. 164360; Court of Appeals No. 357183. On order of the Court, the application for leave to appeal the March 24, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether a genuine issue of material fact exists regarding whether the claimant's 2006 Saturn Ion was, on June 24, 2019, "used or intended for use, to transport, or in any manner to facilitate the transportation, *for the purpose of sale or receipt* of [a controlled substance]." MCL 333.7521(1)(d) (emphasis added).

MICHIGAN AFSCME COUNCIL 25 v COUNTY OF WAYNE, Nos. 164435 and 164436; Court of Appeals Nos. 356320 and 356322. On order of the Court, the application for leave to appeal the April 21, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether the standard set forth in *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982), applies to labor arbitration cases, see *Bay City Sch Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 440 n 20 (1986), and *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150 (1986); and (2) whether the trial court erred in vacating the arbitrator's awards in this case.

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 28, 2022:

CARSON v BANDIT INDUSTRIES, INC, No. 163685; Court of Appeals No. 350257.

ASTEMBORSKI v MANETTA, No. 164160; reported below: 341 Mich App 190.

PEOPLE v SOURANDER, No. 164201; Court of Appeals No. 353707.

OTTO v BATZDORFER, No. 164226; Court of Appeals No. 355936.

LANDRY v AUTO-OWNERS INSURANCE COMPANY, No. 164284; Court of Appeals No. 358941.

Summary Disposition September 29, 2022:

LOVE v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 164679; Court of Appeals No. 362250. By order of August 24, 2022, the defendants were invited to answer the application for leave to appeal the July 25, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the Court of Appeals' order granting in part the defendants' motion to stay with regard to the temporary restraining order concerning benefits to be paid to or on behalf of Walter Powell, and we REMAND this case to that court for reconsideration in light of *Andary v USAA Cas Ins Co*, 343 Mich App 1 (Docket No. 356487). This order does not reflect any opinion on the correctness of that decision, which is currently pending before this Court. Rather, it is a reflection of the fact that *Andary* is binding precedent pending our disposition of the appeal, MCR 7.215(C)(2), so it may be relevant to the court's determination as to whether a partial stay pending appeal is warranted. The Court of Appeals shall expedite its reconsideration of the motion.

LOVE v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 164693; Court of Appeals No. 361174. By order of August 24, 2022, the defendants were invited to answer the application for leave to appeal the July 22, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the Court of Appeals' order granting in part the defendants' motion to stay with regard to the temporary restraining order concerning benefits to be paid to or on behalf of David Love, and we REMAND this case to that court for reconsideration in light of *Andary v USAA Cas Ins Co*, 343 Mich App 1. This order does not reflect any opinion on the correctness of that decision, which is currently pending before this Court. Rather, it is a reflection of the fact that *Andary* is binding precedent pending our disposition of the appeal, MCR 7.215(C)(2), so it may be relevant to the court's determination as to whether a partial stay pending appeal is warranted. The Court of Appeals shall expedite its reconsideration of the motion.

Leave to Appeal Granted September 29, 2022:

ANDARY v USAA CASUALTY INSURANCE COMPANY, No. 164772; Court of Appeals No. 356487. On order of the Court, motion for immediate consideration is GRANTED. The application for leave to appeal the

August 25, 2022 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address whether the Court of Appeals erred when it: (1) held that claimants injured before the effective date of 2019 PA 21 are not subject to the limitations on benefits set forth in MCL 500.3157(7) and (10); (2) held that application of the amended statute to such claimants would violate the Contracts Clause of the Michigan Constitution, Const 1963, art 1, § 10; and (3) remanded the case to the circuit court for discovery to determine whether the no-fault amendments, even when applied only prospectively, pass constitutional muster.

The Clerk of the Court is directed to place this case on the March 2023 session calendar for argument and submission. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Amici who appeared in the Court of Appeals or in this Court are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Motion for Stay Denied September 29, 2022:

ANDARY v USAA CASUALTY INSURANCE COMPANY, No. 164772; reported below: 343 Mich App 1. On order of the Court, the motion for immediate consideration is GRANTED. The motion to stay precedential effect of the Court of Appeals' decision is DENIED.

Summary Disposition September 30, 2022:

PEOPLE v TYLER, No. 163985; Court of Appeals No. 353914. By order of April 15, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the December 2, 2021 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals. We REMAND this case to the Court of Appeals, which, while retaining jurisdiction, shall remand this case to the Macomb Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). At the conclusion of the hearing, the trial court shall determine whether the defendant's trial counsel provided ineffective assistance for failing to move to suppress the evidence obtained from the warrantless inventory vehicle search, and specifically for failing to inquire regarding the existence of a policy of the Warren Police Department regarding inventory searches of vehicles, and for failing to question the officers regarding their compliance with any such policy. The trial court shall then forward the record and its findings to the Court of Appeals, which shall resolve the issues presented by the defendant. We do not retain jurisdiction.

PEOPLE v MURRAY, Nos. 164392 and 164393; reported below: 341 Mich App 205. On order of the Court, the application for leave to appeal the March 24, 2022 judgment of the Court of Appeals is considered. MCR 7.305(H)(1). The Court of Appeals held that regardless of any error for failure to comply with the notice requirement of MCL 768.27b(2), reversal is unwarranted because the admission of the other-acts evidence did not affect the outcome of trial. In light of this holding, we VACATE that part of the Court of Appeals opinion concluding that the prosecution had good cause for its failure to strictly comply with the notice requirement of MCL 768.27b(2). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

MILMAN v FIEGER & FIEGER, PC, No. 164793; Court of Appeals No. 362334.

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the September 7, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. We further ORDER that trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Oral Argument Ordered on the Application for Leave to Appeal September 30, 2022:

PEOPLE v LEMONS, No. 163939; Court of Appeals No. 348277. On order of the Court, the application for leave to appeal the November 18, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address whether the Court of Appeals erred in holding that: (1) the Wayne Circuit Court did not abuse its discretion by concluding that the biomechanical engineering evidence and testimony was inadmissible, or by excluding alternate causation theories that purportedly lacked scientific or factual support; (2) the Wayne Circuit Court correctly denied the defendant relief despite its erroneous decision to exclude the defense experts' opinions regarding the validity of SBS diagnoses, reliance on the triad as a diagnostic tool, and the possibility of choking as an alternative cause of death; or (3) the new evidence presented by the defendant was insufficient to create a reasonable probability of a different outcome on retrial and warrant relief under *People v Cress*, 468 Mich 678, 692 (2003).

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in

the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MILNE v ROBINSON, No. 164190; reported below: 339 Mich App 682. On order of the Court, the application for leave to appeal the December 28, 2021 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall address: (1) whether the owner's liability provision of the Motor Vehicle Code, MCL 257.401(1), irreconcilably conflicts with the Recreational Use Act, MCL 324.73301(1), as to the appellee's liability for the decedent's injury; (2) whether the pertinent inquiry in resolving the apparent statutory conflict in this case is to determine which provision is more specific; and (3) if so, what is the appropriate framework for determining which provision is more specific?

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

In re PAROLE OF RICHARD ALLEN MCBRAYER, No. 164311; Court of Appeals No. 357720. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the March 10, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall include among the issues to be briefed: (1) whether "substantial and compelling" circumstances existed such that the Parole Board erred in failing to deviate from the guidelines; (2) whether and to what extent the Parole Board was required to consider the appellate opinions reversing its prior grants of parole to the appellant; and (3) whether and to what extent those prior appellate opinions should inform review of the Parole Board's most recent exercise of discretion.

The Prisons and Corrections Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition October 4, 2022:

MEDICAL TEAM, INC v AUTO-OWNERS INSURANCE COMPANY, No. 161220; Court of Appeals No. 345449. By order of January 29, 2021, the application for leave to appeal the February 25, 2020 judgment of the Court of Appeals was held in abeyance pending the decision in *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co* (Docket Nos. 161628 and 161650). On order of the Court, the case having been decided on June 10, 2022, 509 Mich 276 (2022), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *Mecosta Co Med Ctr*.

HISER v VILLAGE OF MACKINAW CITY, Nos. 163799 and 163800; Court of Appeals Nos. 354806 and 354807. On order of the Court, the application for leave to appeal the October 21, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *Saugatuck Dunes Coastal Alliance v Saugatuck Township*, 509 Mich 561 (2022). We do not retain jurisdiction.

LICHON v MORSE, No. 164537; Court of Appeals No. 361368. On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Section III(C) of the April 5, 2022 opinion and order of the Oakland Circuit Court. In this section of its opinion, the circuit court held that the issues of enforceability raised by the plaintiff were "beyond the scope of [this Court's] remand" and that it should decline to address the issues for that reason. We clarify here that our July 20, 2021 opinion, 507 Mich 424 (2021), does not preclude the circuit court from addressing the plaintiff's enforceability challenges, which were not addressed or decided on appeal. Accordingly, we REMAND this case to the circuit court for reconsideration of the defendants' motion for summary disposition of the plaintiff's claim for declaratory judgment. We do not retain jurisdiction.

Leave to Appeal Denied October 4, 2022:

CHARLES v LIBERTY MUTUAL INSURANCE COMPANY, No. 163208; Court of Appeals No. 356749.

MICHIGAN SPINE AND BRAIN SURGEONS, PLLC v ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, No. 163835; Court of Appeals No. 355581.

ATKINSON v KREILTER, FALECKI v KREILTER, and MANES v KREILTER, Nos. 163946, 163947, 163948; Court of Appeals Nos. 353079, 353080, and 353364.

PEOPLE v LEACH, No. 164140; Court of Appeals No. 359824.

MUHA v ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, No. 164151; Court of Appeals No. 354476.

PEOPLE v MCVEIGH, No. 164184; Court of Appeals No. 359680.

PEOPLE v EDWARD GREEN, No. 164185; Court of Appeals No. 355619.

PEOPLE v BURCH, No. 164200; Court of Appeals No. 359232.

LOTT v WOODY'S LOGGING, LLC, No. 164203; Court of Appeals No. 358991.

PEOPLE v PRINCE, No. 164206; Court of Appeals No. 352799.

PEOPLE v STACY SORENSON, No. 164220; Court of Appeals No. 353362.

PEOPLE v LANGDON, No. 164238; Court of Appeals No. 359468.

PEOPLE v CAMPBELL, No. 164254; Court of Appeals No. 359105.

In re SMITH, No. 164288; Court of Appeals No. 358220.

PEOPLE v ANDERSON, No. 164290; Court of Appeals No. 359158.

MOORE v LAKELAND CORRECTIONAL FACILITY WARDEN, No. 164293; Court of Appeals No. 356596.

FRYE v GOLFPOINTE VILLAGE CONDOMINIUMS AT PLUMBROOK, No. 164312; Court of Appeals No. 355864.

PEOPLE v SCHLEGEL, No. 164318; Court of Appeals No. 359327.

PEOPLE v MCCLOY, No. 164330; Court of Appeals No. 359470.

PEOPLE v TROY WRIGHT, No. 164371; Court of Appeals No. 354247.

PEOPLE v HARRELL, Nos. 164373 and 164700; Court of Appeals Nos. 360028 and 360030.

BERGMANN v MAESTRO HEALTH AND GROUP ASSOCIATES, INC, No. 164389; Court of Appeals No. 357181.

FLOYD v M & M ZIN ENTERPRISES, INC, No. 164395; Court of Appeals No. 359669.

DOBRONSKI v UNITED FINAL EXPENSE SERVICES, INC, No. 164407; Court of Appeals No. 357057.

PEOPLE v JOHNSTON, No. 164409; Court of Appeals No. 360128.

PEOPLE v HENDERSON, No. 164445; Court of Appeals No. 360254.

PEOPLE v EDICK, No. 164456; Court of Appeals No. 359363.

MILMAN v FIEGER & FIEGER, PC, No. 164464; Court of Appeals No. 360177.

KENWAL PICKLING, LLC v PVS TECHNOLOGIES, INC, No. 164466; Court of Appeals No. 354506.

PEOPLE v OMAR-HILL, No. 164492; Court of Appeals No. 359558.

TBI SOLUTIONS, LLC v GALL, No. 164493; Court of Appeals No. 356747.

MCCORMACK, C.J., did not participate because of her future employment relationship with the American Arbitration Association.

PEOPLE v STEVENS, No. 164509; Court of Appeals No. 360764.

PEOPLE v PICKETT, No. 164514; Court of Appeals No. 360333.

TIN BROTHERS INVESTMENTS, LLC v BROOKS-JOHNSON, No. 164526; Court of Appeals No. 359886.

MITCHELL v MUSKEGON CORRECTIONAL FACILITY WARDEN, No. 164529; Court of Appeals No. 360697.

PEOPLE v HEARN, No. 164532; Court of Appeals No. 355963.

PEOPLE v MICHAEL FLAKER, No. 164536; Court of Appeals No. 360382.

PEOPLE v CHANCE, No. 164544; Court of Appeals No. 354349.

MYERS v MYERS, No. 164545; Court of Appeals No. 358391.

DOA DOA, INC v PRIMEONE INSURANCE COMPANY, No. 164546; Court of Appeals No. 356877.

PEOPLE v JOHN SMITH, No. 164547; Court of Appeals No. 354367.

PEOPLE v BISHOP, No. 164551; Court of Appeals No. 359765.

OVERTON v BELLAMY CREEK CORRECTIONAL FACILITY WARDEN, No. 164561; Court of Appeals No. 360784.

PEOPLE v MALLARD, No. 164571; Court of Appeals No. 360913.

PEOPLE v LANGSFORD, No. 164580; Court of Appeals No. 354311.

ATAIN INSURANCE COMPANY v WARREN HOSPITALITY SUITES, INC, No. 164582; Court of Appeals No. 355928.

PEOPLE v YOUNGBLOOD, No. 164583; Court of Appeals No. 361269.

PEOPLE v VANBUSKIRK, No. 164589; Court of Appeals No. 356564.

ENNEST v CARLSON, No. 164590; Court of Appeals No. 359390.

PEOPLE v JILES, No. 164601; Court of Appeals No. 357455.

BARNETT v BARNETT, No. 164603; Court of Appeals No. 354668.

PEOPLE v WHITFIELD, No. 164605; Court of Appeals No. 356049.

KEITH v HUNTINGTON NATIONAL BANK, No. 164606; Court of Appeals No. 355716.

HEENSTRA v SPECTRUM HEALTH SYSTEMS, No. 164646; Court of Appeals No. 356399.

MOORE v LAKELAND CORRECTIONAL FACILITY WARDEN, No. 164663; Court of Appeals No. 356596.

HUNLEY v PIONEER HEALTH CARE MANAGEMENT, No. 164666; Court of Appeals No. 361922.

Reconsideration Denied October 4, 2022:

PEOPLE v GUTIERREZ, No. 163078; Court of Appeals No. 355749.

PEOPLE v LOVOTNY SHANNON, No. 163910; Court of Appeals No. 358320.

RAINBOW CONSTRUCTION COMPANY, INC v TOWNSHIP OF HOWELL, No. 164028; Court of Appeals No. 354213.

PEOPLE v DAVID MCNEES, No. 164149; Court of Appeals No. 358821.

PEOPLE v CALBERT, No. 164150; Court of Appeals No. 357061.

PEOPLE v CONNOLLY, No. 164219; Court of Appeals No. 359308.

PEOPLE v WILSON, No. 164292; Court of Appeals No. 358964.

PEOPLE v KEVIN SUTHERBY, No. 164296; Court of Appeals No. 359334.

PEOPLE v HACKNEY, No. 164297; Court of Appeals No. 359638.

PEOPLE v ANTONIO BANKS, No. 164314; Court of Appeals No. 359670.

Summary Disposition October 5, 2022:

PEOPLE v KOBI TAYLOR, No. 164596; Court of Appeals No. 357772. On order of the Court, the application for leave to appeal the June 9, 2022 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals affirming the defendant's 65- to 95-year sentences for second-degree murder, VACATE those sentences of the Wayne Circuit Court, and REMAND this case to the trial court for resentencing before a different judge. The trial court, for the third time, failed to address the extent of the 27½-year upward departure sentences that were imposed in this case and explain why such a departure was warranted. *People v Steanhouse*, 500 Mich 453, 476 (2017) (a sentencing court "abuse[s] its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed"), and *People v Smith*, 482 Mich 292, 305-306 (2008) ("the trial judge gave no explanation for the *extent* of the departure independent of the reasons given to impose a departure sentence"). We do not retain jurisdiction.

PEOPLE v STEVEN ROGERS, No. 164769; Court of Appeals No. 362321. On order of the Court, the motion for stay and immediate consideration is GRANTED. The application for leave to appeal the August 10, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. Trial court proceedings in the St. Clair Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction.

Leave to Appeal Granted October 5, 2022:

PEOPLE v LOEW, No. 164133; reported below: 340 Mich App 100. On order of the Court, the application for leave to appeal the January 13, 2022 judgment of the Court of Appeals is considered, and it is GRANTED, limited to the issues of judicial misconduct alleged in Issue II of the defendant's application for leave to appeal. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals correctly concluded that the *ex parte* communications in this case did not violate Canon 3(A)(4)(a)(i) of the Code of Judicial Conduct because they were merely administrative in nature; (2) whether a trial court may properly grant a new trial in a criminal case based on an appearance of impropriety where Canon 3(A)(4) governs the conduct at issue, see *In re Haley*, 476 Mich 180, 194-195 (2006); (3) if the ex parte communications here give rise to legal error for either a violation of Canon 3(A)(4)(a) or an appearance of impropriety, whether the standard for ascertaining reversible prejudice requires a showing of actual harm to the defense, or is instead determined by weighing other factors as well, see, e.g., *Liljeberg v Health Servs Acquisition Corp*, 486 US 847 (1988); and (4) whether the defendant is entitled to a new trial under MCR 2.003 or constitutional guarantees of due process of law. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal October 5, 2022:

PEOPLE v DUFF, No. 163961; Court of Appeals No. 354406. The parties shall include among the issues to be briefed: (1) whether the totality of the circumstances surrounding the officers' conduct of partially obstructing the defendant's ability to move his vehicle would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter, see *People v Lucynski*, 509 Mich 618 (2022); and (2) whether *People v Anthony*, 327 Mich App 24, 40 (2019), correctly held that "only if officers completely block a person's parked vehicle with a police vehicle is the person seized."

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MCNEILL-MARKS v MIDMICHIGAN MEDICAL CENTER-GRATIOT, No. 164302; Court of Appeals No. 348987. The parties shall address whether the

communication from the plaintiff to her attorney regarding Marcia Fields' presence at MidMichigan Medical Center-Gratiot amounted to a "report," as that word is used in Section 2 of the Whistleblowers Protection Act (WPA), MCL 15.362. In answering this question, the parties shall, at a minimum, address whether: (1) the WPA requires that the plaintiff's communication be to an individual with the authority to address the alleged violation of law; (2) the WPA requires that a plaintiff employee specifically intend to make a charge of a violation or suspected violation of law against another; and (3) privileged communications between a client and his or her attorney can constitute a report under the WPA.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

RODRIGUEZ v HIRSHBERG ACCEPTANCE CORP, No. 164454; reported below: 341 Mich App 349. The parties shall address whether the Court of Appeals correctly interpreted MCR 3.501(A)(5) to mean that, where a statute provides for a minimum penalty irrespective of actual damages, no class action may be maintained on the basis of that statute, including a class action for actual damages and equitable relief, unless the statute expressly provides otherwise.

The Michigan Bankers Association and the Consumer Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v HORTON, Nos. 164520 and 164521; Court of Appeals Nos. 359012 and 359218. The parties shall address whether the trial court abused its discretion in ruling that a video recording of the preliminary examination is admissible at trial, despite the fact that the defendant is depicted in the recording dressed in jail garb.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 5, 2022:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v PROTECTIVE INSURANCE COMPANY, No. 164026; Court of Appeals No. 355532.

HANBACK v MEMBERSELECT INSURANCE COMPANY, No. 164362; Court of Appeals No. 355098.

PEOPLE v RYAN JOHNSON, No. 164414; Court of Appeals No. 360083.

PEOPLE v RYAN JOHNSON, No. 164416; Court of Appeals No. 360085.

PEOPLE v GNOTEK, No. 164491; Court of Appeals No. 360971.

PEOPLE v FELDER, No. 164523; Court of Appeals No. 357573.

DAVIS v WAYNE COUNTY ELECTION COMMISSION, No. 164824; Court of Appeals No. 363010.

Summary Disposition October 7, 2022:

PEOPLE v ODELL DOUGLAS, No. 160083; Court of Appeals No. 347741. By order of August 3, 2021, the application for leave to appeal the June 28, 2019 order of the Court of Appeals was held in abeyance pending the decision in *People v Stovall* (Docket No. 162425). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 301 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the sentence of the Genesee Circuit Court and REMAND this case to the trial court for resentencing. The defendant's parolable life sentence for second-degree murder, committed when he was under the age of 18, is cruel or unusual punishment in violation of Const 1963, art 1, § 16. *Stovall*, *supra*. His successive motion for relief from judgment is not barred by MCR 6.502(G)(1) because the motion is based on a retroactive change in the law, *Montgomery v Louisiana*, 577 US 190 (2016). See *Stovall*, 510 Mich at 310-311. The motion to remand is DENIED as moot.

ZAHRA, J. (*concurring*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 332, 347-362 (2022). I do not believe defendant's parolable life sentence for second-degree murder committed when he was under the age of 18 amounts to cruel or unusual punishment under Const 1963, art 1, § 16. While I continue to believe *Stovall* was wrongly decided, I accept the will of the Court and capitulate that resentencing is warranted under the majority opinion in *Stovall*.

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment under MCR 6.502(G) and would thereforedeny leave to appeal. But even if defendant could overcome the procedural bar, I would conclude that his constitutional argument fails for the reasons stated by Justice ZAHRA in his dissent in *Stovall*.[1] For these reasons, I dissent.

PEOPLE v KINNEY, No. 163719; Court of Appeals No. 351824. By order of March 8, 2022, the application for leave to appeal the September 16, 2021 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Stovall* (Docket No. 162425). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 301 (2022),

[1] Because the rest of my colleagues have reached this question, it is appropriate for me to likewise indicate my view. See *In re Certified Questions*, 506 Mich 332, 414 & n 21 (2020) (VIVIANO, J., concurring in part and dissenting in part).

the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, VACATE the sentence of the Genesee Circuit Court, and REMAND this case to the trial court for resentencing. The defendant's parolable life sentence for second-degree murder, committed when he was under the age of 18, is cruel or unusual punishment in violation of Const 1963, art 1, § 16. *Stovall*, *supra*. His successive motion for relief from judgment is not barred by MCR 6.502(G)(1) because the motion is based on a retroactive change in the law, *Montgomery v Louisiana*, 577 US 190 (2016). See *Stovall*, 510 Mich at 310-311. In all other respects, leave to appeal is DENIED, because the remaining questions presented have become moot in light of the relief ordered.

ZAHRA, J. (*concurring*). For the reasons stated in my dissent in *People v Stovall*, 310 Mich 301, 332, 347-362 (2022), I do not believe defendant's parolable life sentence for second-degree murder committed when he was under the age of 18 amounts to cruel or unusual punishment under Const 1963, art 1, § 16. While I continue to believe *Stovall* was wrongly decided, I accept the will of the Court and capitulate that resentencing is warranted under the majority opinion in *Stovall*.

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment under MCR 6.502(G) and would therefore deny leave to appeal. But even if defendant could overcome the procedural bar, I would conclude that his constitutional argument fails for the reasons stated by Justice ZAHRA in his dissent in *Stovall*.[1] For these reasons, I dissent.

PEOPLE V PINSON, No. 164465; reported below: 344 Mich App 305. On order of the Court, the application for leave to appeal the April 7, 2022 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court for reconsideration. The Court of Appeals relied in part on its conclusion that "jailtime is not an intermediate sanction pursuant to MCL 769.31(b)." But the prohibition of jailtime as an intermediate sanction was implemented by 2020 PA 395, which did not become effective until March 24, 2021. At the time of the defendant's offenses around November 2017 and his sentencing on November 30, 2020, MCL 769.31(b), as amended by 2004 PA 220, did not explicitly exclude "imprisonment in a county jail" from its definition of an intermediate sanction. In fact, former MCL 769.31(b)(*viii*) explicitly listed jail as an example of an intermediate sanction. Accordingly, the Court of Appeals inappropri-

[1] Because the rest of my colleagues have reached this question, it is appropriate for me to likewise indicate my view. See *In re Certified Questions*, 506 Mich 332, 414 & n 21 (2020) (VIVIANO, J., concurring in part and dissenting in part).

ately applied the current version of MCL 769.31(b). On remand, the Court of Appeals shall reconsider its decision in light of this correction.

PEOPLE v TARDY, No. 164503; Court of Appeals No. 360026. On order of the Court, the application for leave to appeal the April 14, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals shall specifically address whether MCR 6.428 applies under the procedural posture and factual circumstances present in this case.

Oral Argument Ordered on the Application for Leave to Appeal October 7, 2022:

PEOPLE v ANTHONY HULL and PEOPLE v BRANDI HULL, Nos. 164195 and 164227; Court of Appeals Nos. 354735 and 354667. The parties shall address: (1) whether a person has a right to resist arrest where an arresting officer's actions cause the person to reasonably believe the arrest is unlawful, *Drennan v People*, 10 Mich 169, 177 (1862); and (2) whether the prosecution presented sufficient evidence that defendants resisted, obstructed, or opposed a police officer, *People v Vasquez*, 465 Mich 83 (2001). In addition, the parties in Docket No. 164195 shall address whether a person may aid another in resisting an unlawful arrest, and the parties in Docket No. 164227 shall address whether counsel was ineffective for failing to request that the jury be instructed that a person has a right to resist arrest where an arresting officer's actions cause the person to reasonably believe the arrest is unlawful.

We further ORDER the Tuscola Circuit Court, in accordance with Administrative Order 2003-03, to determine whether defendant Anthony Ray Hull is indigent and, if so, to appoint counsel to represent him in this Court.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the plaintiff, and 20 minutes for defendants, to be divided at their discretion. MCR 7.314(B)(2).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 7, 2022:

GILBERT v GILBERT, No. 164460; Court of Appeals No. 359477.

In re KA EL-SHABAZZ, No. 164690; Court of Appeals No. 358393.

Superintending Control Denied October 12, 2022:

VANDUSSEN v 4TH CIRCUIT COURT JUDGE, No. 164847.

Summary Disposition October 14, 2022:

PEOPLE v DUFEK, No. 164441; Court of Appeals No. 349918. On order of the Court, the application for leave to appeal the March 31, 2022 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court for reconsideration of the defendant's ineffective-assistance-of-counsel claims. Although the Court of Appeals cited the correct standard for assessing prejudice under *Strickland v Washington*, 466 US 668 (1984), it did not apply that standard. Prejudice is established where a defendant shows that "but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012). As the United States Supreme Court explained in *Strickland*:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. [*Strickland*, 466 US at 695-696.]

The defendant argued on appeal that his trial counsel was ineffective for asking his ex-wife whether she was aware of any other allegations that the defendant had molested a child. In response, the witness said she had learned from the defendant's sister that he had molested her when they were children. The Court of Appeals agreed with the defendant that his counsel was objectively unreasonable for opening the door to other-acts evidence. But it held that he was not prejudiced by the error.

In assessing whether the defendant was prejudiced, the panel made a critical error. It concluded that because the victim's testimony was "sufficient to convict defendant," he was not prejudiced by the admission of other-acts evidence. *People v Dufek (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 31, 2022 (Docket No. 349918), p 3. Sufficient evidence to convict does not obviate the need

to make a prejudice determination. Rather, as the Court noted in *Strickland*, a prejudice analysis requires determining how the error affected other evidence properly presented.

On remand, the Court of Appeals shall resolve the defendant's claims of ineffective assistance of counsel under the correct standard, evaluating the interaction of the improper other-acts evidence with the other evidence presented at trial. Additionally, since this issue logically connects to the defendant's claim of cumulative error, that claim should also be addressed on remand, if necessary. We do not retain jurisdiction.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

Leave to Appeal Denied October 14, 2022:

PEOPLE v GRUBER, No. 163884; Court of Appeals No. 352655.

MCCORMACK, C.J. (*dissenting*). I dissent from the Court's denial and write separately because it isn't clear to me that the test to determine if the jury was impartial from *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228 (1989), is one this Court should continue to use in criminal adjudication.

Mr. Gruber was convicted of one count of first-degree criminal sexual conduct, two counts of second-degree criminal sexual conduct, and one count of accosting a minor for immoral purposes. During voir dire, a prospective juror expressed hesitation about her ability to be impartial. When asked by the court if there was anything that prohibited her from being a fair juror, the prospective juror answered, "I have three daughters, I work in an elementary school. My half-sister was abused when she was probably seven." When the court followed up and asked if the juror thought she could put those things aside to make a fair decision, she responded, "I will do my best."

She was clearer about her inability to be fair in response to Mr. Gruber's counsel, who asked her to explain her hesitancy about her ability to be fair. Counsel asked the juror whether her hesitancy meant she would have "prejudice against the Defendant," and she replied that it would. When counsel asked the juror directly whether she would be "a suitable juror" in Mr. Gruber's case, she candidly replied, "Probably not."

The court attempted to rehabilitate the juror, "just to straighten this out a little bit." The court did so by reminding her that even though it was a "[d]ifficult case," that it comes down to whether the juror can base their decision on what's said in the courtroom, "[p]ut aside any sympathy or prejudice that you may have about the topic and follow the law. And make an assessment based on the evidence and the law." The juror wasn't able to confirm that she could do that. She responded, "It's just really hard. I think — I mean, it's hard for everybody. But I think it's just a tough topic."

When the court refused to remove this prospective juror for cause, defense counsel used a peremptory challenge. Subsequently, a second prospective juror expressed concern about his ability to remain impar-

tial. But this prospective juror eventually stated that he would be able to evaluate the evidence without prejudice according to the law. As a result, the court correctly refused to remove this prospective juror for cause. Defense counsel did not have any peremptory challenges left, and therefore, this juror was seated.

This Court announced a four-part test to determine whether a trial court erred by not granting a for-cause challenge in *Poet*, a civil dispute. The test requires "some clear and independent showing on the record that":

> (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*Poet*, 433 Mich at 241.]

The Court of Appeals imported the test into the criminal context in *People v Legrone*, 205 Mich App 77 (1994), but the panel did not explain how the test mapped on to a criminal defendant's Sixth Amendment right to an impartial jury.

In applying the *Poet* test to Mr. Gruber's claim, the panel held that the court's decision not to excuse the first prospective juror for cause was not an abuse of discretion. *People v Gruber*, unpublished per curiam opinion of the Court of Appeals, issued November 4, 2021 (Docket No. 352655), pp 3-4. The panel reasoned that the first prospective juror's "ambivalence did not demonstrate that she was biased against defendant, or that she had firmly made up her mind about the case on the basis of her personal experience." *Id*. at 3. According to the panel, the juror's "statements were not declarations that [she] could not set aside her views. Rather, the statements demonstrate hesitancy about the 'subject matter.' " *Id*.

I disagree. While the abuse of discretion standard is high, in my view, Mr. Gruber's claim meets it. The prospective juror said she was not a suitable juror because of a personal history with the accusation at issue, and she resisted the trial court's rehabilitation attempt. See *People v Lee*, 212 Mich App 228, 251 (1995) (a juror does not have to be excused if the juror can set aside his or her previous opinion in order to render a fair and impartial verdict).

As a result of its holding about the first juror, the panel did not address whether the seated juror "was objectionable." Whether the seated juror "was objectionable" is a harder question, because I don't know what this standard means. The *Poet* decision tried to explain it in a footnote:

> Furthermore, as the term "objectionable," defined in *The Random House Dictionary of the English Language: Unabridged Edition* as "causing or tending to cause an objection, disapproval or protest" lends itself to the concededly imprecise "know it when one sees it" standard, we submit that a determination of objectionableness does not *require* proof that a potential juror be

> excusable for cause. See *Longshore*[*v Fronrath Chevrolet*, 527 So 2d 922, 924 n 12 (Fla App, 1988)]. However, the articulated reasons should include factors which amount to more than mere triviality, i.e., juror Doe is objectionable because the juror is wearing bright orange jewelry or a punk rock hair cut. [*Poet*, 433 Mich at 241 n 15.]

The room between a juror who should have been excused for cause and one with an unusual hair cut is pretty vast. I am not aware of another jurisdiction with a similar standard.

Some jurisdictions apply the harmless-error standard to this claim. In those jurisdictions, the defendant must establish that the jury was not impartial to prevail. See *United States v Rubin*, 37 F3d 49, 54 (CA 2, 1994); *United States v Wharton*, 320 F3d 526, 535-536 (CA 5, 2003); *United States v Snarr*, 704 F3d 368, 387-388 (CA 5, 2013); *State v Hickman*, 205 Ariz 192, 196, 201 (2003); *Klahn v State*, 96 P3d 472, 482-484 (Wy, 2004).

Other jurisdictions consider a trial court's failure to grant a for-cause challenge as automatically requiring reversal. See *State v Odenbaugh*, 82 So 3d 215 (La, 2011); *State v Hausauer*, 335 Mont 137 (2006). "Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. An erroneous ruling depriving an accused of a peremptory challenge is a substantial violation of his constitutional and statutory rights and constitutes reversible error." *Odenbaugh*, 82 So 3d at 237 (citations omitted).

I would follow Louisiana and Montana's lead. For reasons that I have expressed before, see *People v Kabongo*, 507 Mich 78, 151 (2021) (opinion by MCCORMACK, C.J.), the erroneous denial of a defendant's peremptory challenge requires automatic reversal because of the difficulty of showing actual prejudice. *Id*. at 152; *State v Mootz*, 808 NW2d 207, 225 (Iowa, 2012). "The rationale underlying an automatic-reversal rule in this context is precisely the same as one that drives the structural-error doctrine—the difficulty or impossibility of determining prejudice to the defendant as a result of the error." *Kabongo*, 507 Mich at 153 (opinion by MCCORMACK, C.J.). See *United States v Gonzalez-Lopez*, 548 US 140, 149 n 4 (2006) (stating that "here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error"); see also *Hausauer*, 335 Mont at 147 ("The District Court's failure to dismiss [juror] B.M. for cause [requiring the use of a peremptory challenge] was an abuse of discretion, and resulted in structural error which requires a new trial."); *State v Campbell*, 772 NW2d 858, 862 (Minn App, 2009) ("[A]utomatic reversal remains the appropriate remedy when a trial court erroneously denies a defendant's peremptory challenge, even after the United States Supreme Court's recent decision in *Rivera v Illinois*, [556 US 148], (2009)," because an " 'erroneous denial of a peremptory challenge . . . does not lend itself to harmless error analysis.' ") (alteration in original), quoting *State v Reiners*, 664 NW2d 826, 835 (Minn, 2003). The cost of a court's erroneous refusal to strike a juror, resulting in a defendant's inability to

strike another juror, is not measurable from a trial record; therefore, a harmfulness analysis is inappropriate.

I would have granted leave to address this question and therefore respectfully dissent from the Court's denial order.

BERNSTEIN, J., joins the statement of MCCORMACK, C.J.

Leave to Appeal Denied October 24, 2022:

CARTRETTE v CITY OF MELVINDALE POST 6032 VETERANS OF FOREIGN WARS OF THE UNITED STATES, No. 164277; Court of Appeals No. 355527.

WELCH, J. (*dissenting*). This case involves an attempt to garnish funds held by defendant the Department of Michigan, Veterans of Foreign Wars of the United States, Inc. (the Michigan VFW). Codefendant city of Melvindale Post 6032 (Post 6032) was a Michigan chapter of the VFW that was placed on a 90-day suspension by the Michigan VFW on September 23, 2013, because of delinquency in its audits and reporting. On January 30, 2014, the Michigan VFW recommended that Post 6032's charter be revoked, and the local chapter was declared defunct on July 8, 2014. The defunct Post 6032's assets, including the proceeds from the sale of its building, totaled approximately $100,000 and were transferred to the Michigan VFW pursuant to the national VFW's bylaws.

Prior to Post 6032's charter revocation, plaintiff was allegedly injured when she slipped and fell while serving drinks at Post 6032 on November 14, 2013. She filed a negligence action on November 24, 2015, and, after not receiving a response and using alternative service, was awarded $275,000 via a default judgment. She then filed a writ of garnishment against the Michigan VFW to collect on the judgment.

In this lawsuit, she has argued that she should be entitled to garnish funds from the Michigan VFW. Postjudgment garnishment proceedings are governed by MCR 3.101, which provides that a garnishee is liable for "all tangible or intangible property of the defendant that, when the writ is served on the garnishee, the garnishee holds by conveyance, transfer, or title that is void as to creditors of the defendant." MCR 3.101(G)(1)(h). In *Nationsbanc Mtg Corp of Georgia v Luptak*, 243 Mich App 560, 567 (2000), the Court of Appeals held that MCR 3.101(G)(1)(h) "applies only to conveyances that are *void* as to creditors at the time the writ is served on the garnishee defendant." The Court of Appeals read "the court rule as requiring a previous judicial determination that the transfer at issue is indeed void." *Id*. Applying the reasoning in *Nationsbanc* to this case, the Court of Appeals concluded that plaintiff could not obtain a judgment against the VFW because she had not properly filed a declaratory judgment to void the transfer. Plaintiff argues that the transfer from Post 6032 to the Michigan VFW was voidable and that she should therefore be able to garnish the funds.

This case presented the opportunity for this Court to examine the continued viability of *Nationsbanc*. In *Nationsbanc*, Judge KELLY in his partial dissent noted, "In a garnishment proceeding, the affidavit acts as the plaintiff's complaint . . . and the garnishee's disclosure serves as the

answer." *Id*. at 569 (opinion by KELLY, J.), citing MCR 3.101(M)(2). Further, "[i]f there is a dispute regarding the garnishee defendant's liability, the issue shall be tried in the same manner as other civil actions." *Nationsbanc*, 243 Mich App at 569-570, citing MCR 3.101(M)(1). The rules "clearly indicate that disputes over the validity of a transfer affecting the garnishee's liability shall be tried in the garnishment proceeding." *Nationsbanc*, 243 Mich App at 570. The issue of whether the term "void" in MCR 3.101(G)(1)(h), applies to *voidable* transactions or to *voided* transactions is significant and, I believe, worthy of this Court's attention. Specifically, this Court should analyze how the "void" provision in MCR 3.101(G)(1)(h) interacts with the methods for determining garnishee liability set forth later in the same rule, MCR 3.101(M)(1). For these reasons, I would have granted leave in this case.

WASHTENAW COUNTY PARKS AND RECREATION COMMISSION v VORTEX AQUATIC STRUCTURES INTERNATIONAL, INC, No. 164310; Court of Appeals No. 355889.

TELEHOWSKI v TELEHOWSKI, Nos. 164458 and 164459; Court of Appeals Nos. 357521 and 357528.

WELCH, J. (*dissenting*). I dissent from the Court's decision to deny leave to appeal. I would have instead ordered additional briefing and scheduled oral argument to address whether, before deciding a motion to change custody, a trial court's failure to make threshold "proper cause shown" or "change of circumstances" findings under MCL 722.27(1)(c) is subject to harmless error review or some other standard of review.

The plaintiff-father, an American citizen, and defendant-mother, a Mexican citizen, are the parents of a minor child who was born in the United States and holds dual citizenship. The parties married in Mexico, but in 2018, while living in Michigan, they divorced. A consent judgment of divorce was entered in Michigan. The parties shared joint legal custody of the child. Defendant had sole physical custody, and plaintiff was entitled to parenting time. Under the consent judgment, plaintiff agreed to permit defendant to leave Michigan with their child if she desired. The parties also agreed in the consent judgment that the usual 100-mile rule governing parental moves would not apply and that if defendant relocated, plaintiff would be entitled to five weeks of parenting time per year.

In 2019, defendant relocated to Mexico with the child, and she subsequently obtained a restraining order from a Mexican court, which had the legal effect of preventing plaintiff from exercising parenting time with the child. The parties dispute the factual basis for the restraining order and the nature of their interactions and efforts to resolve parenting time disputes after the restraining order was obtained. In March 2020, plaintiff filed a motion to change custody, and defendant opposed the motion on several grounds, including jurisdiction. Following complaints from plaintiff, the Friend of the Court moved to require defendant to show cause why she should not be held in contempt of court for failing to abide by the parenting time agreement.

After multiple hearings, the trial court set forth its findings on the record and concluded that defendant denied plaintiff parenting time in bad faith, held her in contempt of the court's parenting time orders, and opined that Michigan has exclusive, continuing jurisdiction over the custody determination.[1] The trial court then set the change of custody matter for an evidentiary hearing. Defendant's counsel appeared and participated in the hearing on the motion to change custody and argued, among other things, that there had been no change in circumstances. The trial court subsequently granted plaintiff sole physical and sole legal custody of the child. Neither the trial court's verbal statements during the hearings nor its written order articulated the factual basis for "proper cause shown" or a "change of circumstances" that would authorize modification of the custody provisions in the consent judgment of divorce as required by MCL 722.27(1)(c).

Defendant filed two separate appeals, and among other things, she challenged the trial court's decisions to review custody without first making findings with respect to proper cause or a change of circumstances (PCCOC). The Court of Appeals consolidated the appeals and affirmed. Relying on this Court's decision in *Fletcher v Fletcher*, 447 Mich 871 (1994), and *In re AP*, 283 Mich App 574 (2009), the Court of Appeals determined that the PCCOC issue was subject to harmless error review. The panel also noted that the purpose of the PCCOC findings is to "limit unwarranted and disruptive changes to custody orders." *Telehowski v Telehowski*, unpublished per curiam opinion of the Court of Appeals, issued April 21, 2022 (Docket Nos. 357521 and 357528), p 3. The panel held that the trial court erred by not making PCCOC findings before scheduling an evidentiary hearing to determine the merits of plaintiff's request to change custody; however, the error was deemed harmless. The Court's entire analysis proceeded as follows:

> One of the statutory best-interest factors is the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). Plaintiff's motion clearly demonstrated defendant was unwilling to facilitate and encourage a relationship between SAT and plaintiff. For nearly a year at the time of the motion, and over two years at the time of the change of custody, defendant had completely refused to facilitate parenting time—or communication of any kind—with plaintiff. In addition, defendant sought and obtained a restraining order against plaintiff in a Mexican court, meaning any contact plaintiff had with SAT would have been a violation of Mexican law. These easily constituted appropriate grounds, premised on a statutory best-interest factor, and material changes since the entry of the last custody order in the conditions surrounding SAT's custody that could have a signifi-

[1] Plaintiff applied for leave to appeal, which the Court of Appeals denied. This Court denied leave on June 1, 2021. *Telehowski v Telehowski*, 507 Mich 956 (2021).

> cant effect on SAT's life. *Vodvarka*[*v Grasmeyer*], 259 Mich App [499,] 510-515 [(2003)]. Accordingly, while the trial court erred by failing to make a finding regarding proper cause or change of circumstances, the error was harmless. [*Telehowski*, unpub op at 3.]

Under a harmless error standard of review, I have little reason to dispute the Court of Appeals' conclusion that the trial court's failure to make threshold PCCOC findings was harmless on the current record.[2] But I question whether harmless error is the appropriate standard of review when a trial court fails to make PCCOC findings prior to changing custody. Had PCCOC findings been made by the trial court, those findings would have been reviewed under the "great weight of the evidence standard"[3] pursuant to *Corporan v Henton*, 282 Mich App 599, 605 (2009). Thus, the end result seems to be that the Court of Appeals will defer to a trial court when it does its job as to PCCOC findings, and it will also defer to the trial court if it does not do its job so long as the appellate court can find factual support for PCCOC findings in the record. While this might be convenient for purposes of appellate review, it does not seem consistent with the notion that the threshold PCCOC requirement is intended to avoid unwarranted disruptions in a child's custodial environment. Regardless of the practicalities of the situation, it is not clear to me that this Court's decision in *Fletcher* requires harmless error review of the complete failure to make threshold PCCOC findings.

In *Fletcher*, 447 Mich at 877 (opinion by BRICKLEY, J.), this Court pointed to MCL 722.28[4] and opined that "[b]y its terms, § 8 distinguishes among three types of findings and assigns standards of review to each. Findings of fact are to be reviewed under the 'great weight' standard, discretionary rulings are to be reviewed for 'abuse of discre-

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[2] The Court of Appeals articulated what constitutes PCCOC for purposes of a request to change custody in *Vodvarka*, 259 Mich App at 509-514, and the record in this case does seem to satisfy that standard. It is notable, however, that while a request to change parenting time is subject to the same threshold PCCOC requirement under MCL 722.27(1)(c), the Court of Appeals has held that PCCOC has a different and less stringent meaning in the context of a request to change parenting time than the *Vodvarka* standard for requests to change custody. See *Shade v Wright*, 291 Mich App 17, 28-29 (2010).

[3] Under the great weight of the evidence standard, this Court defers to the trial court's findings of fact unless the trial court's findings "clearly preponderate in the opposite direction." *Fletcher*, 447 Mich at 878 (opinion by BRICKLEY, J.) (quotation marks and citation omitted).

[4] "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28.

tion,' and questions of law for 'clear legal error.' " But then in addressing the "proper disposition of custody cases following appellate review," a majority opined that "[i]n accord with [*Dempsey v Dempsey*, 409 Mich 495 (1980)], upon a finding of error an appellate court should remand the case for reevaluation, unless the error was harmless." *Fletcher*, 447 Mich at 888-889 (opinion by BRICKLEY, J.)[5] Notably, Justice MALLETT joined Justice BRICKLEY's opinion "except with respect to the standard of review." *Id*. at 890 (opinion by MALLETT, J.). And Justice LEVIN authored a separate opinion, which Justice MALLETT joined, in which he concluded, "I agree with the observations of the lead opinion in part III except that I would be inclined to allow the Court of Appeals considerable leeway in deciding whether to remand for more specific fact finding, and I would not suggest that remand for reevaluation of a custody award is necessarily the correct disposition unless the error perceived by the Court of Appeals is seen as harmless." *Fletcher*, 447 Mich at 899-900 (opinion by LEVIN, J.).

Based on the fractured discourse in *Fletcher* and the analysis in *In re AP*, I can understand why the Court of Appeals concluded that a harmless error standard could be applied in this case. But *Fletcher* was not a case about the lack of threshold PCCOC findings. In fact, *Fletcher* was not even a case about altering prior custody or parenting time judgments or orders; it was a direct appeal from the original judgment of divorce. As such, MCL 722.27(1)(c) played no role in *Fletcher*.

Adding to this confusion are two orders that this Court has issued in recent years, which seem to suggest that strict compliance with the PCCOC requirement is necessary before a court should entertain a request to alter the custodial environment. See, e.g., *Daly v Ward*, 501 Mich 897, 898 (2017) (denying leave to appeal but stating that the Court was taking the "opportunity to emphasize how critical it is that trial courts fully comply with MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment"); *O'Brien v D'Annunzio*, 507 Mich 976 (2021) (vacating the decisions of the lower courts and remanding for further proceedings because the trial court had not made PCCOC findings or conducted an evidentiary hearing before entering an order that effectively changed the custodial environment). In *O'Brien*, the Court referred to *Daly* and reiterated that compliance with MCL 722.27(1)(c) is especially important because it will often be " 'difficult—if not altogether impossible—to effectively remedy' " an error on appeal or to " 'restore the *status quo ante*' " without harming the child. *O'Brien*, 507 Mich at 977, quoting *Daly*, 501 Mich at 898. *Daly* and *O'Brien* could be read as requiring something closer to strict compliance with the procedural and substantive requirements of MCL 722.27(1)(c). While the facts and procedural history of this case are different than in *Daly* and *O'Brien*, the same overarching concerns

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[5] Justice GRIFFIN, joined by Justice RILEY, concurred with the lead opinion except as to the conclusion that "extramarital conduct may not be probative of moral fitness under the Child Custody Act." *Fletcher*, 447 Mich at 900 (GRIFFIN, J., concurring in part and dissenting in part).

would seem to ring true in any situation where a child's custodial environment is subject to alteration.

The caselaw in Michigan is less than clear about the proper standard of review to be applied to a trial court's failure to make threshold PCCOC findings under MCL 722.27(1)(c) before moving on to the merits of a request to change custody. I believe the Court should have taken this case to resolve this ambiguity as to requests to change established custodial arrangements. As a result, I respectfully dissent.

MCCORMACK, C.J., joins the statement of WELCH, J.

Summary Disposition October 28, 2022:

PEOPLE V WELSH, No. 162777; Court of Appeals No. 352517. On October 13, 2022, this Court heard oral argument on the application for leave to appeal the June 18, 2019 and February 18, 2021 judgments of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). We REVERSE in part the June 18, 2019 judgment of the Court of Appeals and REMAND this case to the Saginaw Circuit Court for a new trial before a properly instructed jury. The Court of Appeals correctly held that the trial court erred when it instructed the jury that the defendant's conspiracy with regard to an intent to murder one individual could be transferred to charges of conspiracy with intent to murder others. The panel erred, however, in finding no cause to reverse. The trial court's erroneous instruction that the transferred-intent doctrine applied to the defendant's conspiracy charges permitted the jury to find the defendant guilty of conspiracy against the identified victims (Berrian and Jones) on the basis of a different, uncharged conspiracy against one individual (DT). The jury's note during deliberations suggests that the jury did so, and at a minimum, even assuming that the error was nonconstitutional, the defendant is entitled to a new trial because the error "undermined reliability in the verdict." *People v Cornell*, 466 Mich 335, 364 (2002). In all other respects, the application for leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Reconsideration Denied October 28, 2022:

PEOPLE V KEJUAN WATTS, No. 164785; Court of Appeals No. 360896.

Leave to Appeal Denied October 31, 2022:

PEOPLE V BOSHELL, Nos. 163258 and 163259; reported below: 337 Mich App 322.

JACKSON V LAKELAND CORRECTIONAL FACILITY WARDEN, No. 164223; Court of Appeals No. 357408.

PEOPLE V FERREE, No. 164246; Court of Appeals No. 358826.

PEOPLE v MAXIE JOHNSON, No. 164247; Court of Appeals No. 359359.

PEOPLE v WASHINGTON, No. 164249; Court of Appeals No. 359636.

PEOPLE v COX, No. 164348; Court of Appeals No. 358951.

PEOPLE v CRAWLEY, No. 164381; Court of Appeals No. 360544.

In re BURRESS AND KIZER, No. 164386; Court of Appeals No. 356653.

PEOPLE v MCNEAL, No. 164406; Court of Appeals No. 359697.

PEOPLE v AQUARIUS JOHNSON, No. 164425; Court of Appeals No. 360266.

GRAHAM v MCPHAIL, No. 164438; Court of Appeals No. 355892.

ZIRNHELT v MCCALL, No. 164446; Court of Appeals No. 354776.

PEOPLE v BOWMAN, No. 164472; Court of Appeals No. 361099.

PEOPLE v LUDALE JONES, No. 164481; Court of Appeals No. 360478.

PEOPLE v STEVEN COOPER, No. 164494; Court of Appeals No. 359548.

PEOPLE v HOWARD JOHNSON, No. 164495; Court of Appeals No. 359982.

PEOPLE v MANCIEL, No. 164538; Court of Appeals No. 335156.

PEOPLE v MOSS, No. 164548; Court of Appeals No. 360188.

PEOPLE v PRETTYATTIE COOPER, No. 164553; Court of Appeals No. 361056.

PEOPLE v LANDERS, No. 164554; Court of Appeals No. 360208.

PEOPLE v DIAZ-LOPEZ, No. 164556; Court of Appeals No. 353826.

PEOPLE v DANFORD, No. 164562; Court of Appeals No. 360156.

PEOPLE v GILLESPIE, No. 164577; Court of Appeals No. 360834.

PEOPLE v MCDOWELL, No. 164581; Court of Appeals No. 360038.

In re HARRISON, No. 164599; Court of Appeals No. 360294.

PEOPLE v WALKER, No. 164600; Court of Appeals No. 355259.

PEOPLE v TIGGART, No. 164602; Court of Appeals No. 360264.

PEOPLE v MAYWONN ANDREWS, No. 164613; Court of Appeals No. 360599.

PEOPLE v NEAL, No. 164614; Court of Appeals No. 360509.

PEOPLE v VANTIELEN, No. 164616; Court of Appeals No. 360689.

PEOPLE v KREASON, No. 164622; Court of Appeals No. 359682.

PEOPLE v HOUSTON, No. 164626; Court of Appeals No. 360763.

KOLAILAT v MCKENNETT, No. 164635; Court of Appeals No. 357248.

ZELIASKO v AL-DOROUGH, No. 164637; Court of Appeals No. 357397. ZAHRA, J., would grant leave to appeal.

PEOPLE v CRUZ, No. 164650; Court of Appeals No. 360525.

PEOPLE v MICHAEL FLAKER, No. 164659; Court of Appeals No. 361060.

PEOPLE v WILLEY, No. 164661; Court of Appeals No. 360420.

PEOPLE v MOSBY, No. 164662; Court of Appeals No. 355252.

BURKHOLDER v PINCKNEY COMMUNITY SCHOOLS, No. 164678; Court of Appeals No. 360398.

PEOPLE v SCOTT, No. 164681; Court of Appeals No. 361806.

PURKEY v PRANGE, No. 164682; Court of Appeals No. 358704.

PEOPLE v CURRAN, No. 164697; Court of Appeals No. 360953.

PEOPLE v TIMOTHY CROWLEY, No. 164711; Court of Appeals No. 356348.

WIGGINS v GANI, No. 164714; Court of Appeals No. 357895.

PEOPLE v GORDON, No. 164717; Court of Appeals No. 361636.

PEOPLE v MOORE, No. 164745; Court of Appeals No. 361845.

PEOPLE v SNYDER, No. 164766; Court of Appeals No. 360775.

PEOPLE v DRANE, No. 164791; Court of Appeals No. 360580.

Reconsideration Denied October 31, 2022:

DORSEY v SURGICAL INSTITUTE OF MICHIGAN, LLC, No. 163692; reported below: 338 Mich App 199.

PEOPLE v DARMARROE TUNSTALL, No. 164411; Court of Appeals No. 358797.

Summary Disposition November 2, 2022:

ARCHER v BUNCE, No. 164612; Court of Appeals No. 359693. On order of the Court, the application for leave to appeal the June 3, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Granted November 2, 2022:

PEOPLE v BURKMAN and PEOPLE v WOHL, Nos. 164638 and 164639; reported below: 341 Mich App 734. The parties shall address: (1)

whether the Court of Appeals properly interpreted MCL 168.932(a); and (2) whether MCL 168.932(a) is unconstitutional on its face or as applied to the defendants.

The total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellants, to be divided at their discretion, and 20 minutes for the appellee. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal November 2, 2022:

RAVENELL v AUTO CLUB INSURANCE ASSOCIATION, No. 164317; Court of Appeals No. 348436. The parties shall address the extent to which the reasonableness of an insurer's mistaken belief that it was required to pay a claim is a factor in determining whether the insurer is entitled to equitable subrogation. See *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 507 Mich 498 (2021); see also 83 CJS, Subrogation, § 43 ("Equitable subrogation will not be used to benefit parties who were negligent in their business transactions, or who failed to act according to ordinary and reasonable business practices and who were obviously in the best position to protect their own interests."); 73 Am Jur 2d, Subrogation, § 17 ("One charged with culpable negligence may not be entitled to equitable subrogation. . . . Ordinary negligence may be taken into consideration in determining whether the negligent party is entitled to subrogation, but ordinary negligence alone is not a complete bar to subrogation where, in spite of such negligence, the equities are still in favor of the subrogee.").

Leave to Appeal Denied November 2, 2022:

PEOPLE v KEJUAN DOUGLAS, No. 163033; Court of Appeals No. 355954.

PEOPLE v GLISSON, No. 163888; Court of Appeals No. 355454.

In re PETITION OF BERRIEN COUNTY TREASURER FOR FORECLOSURE, No. 164497; reported below: 341 Mich App 114.

GRIMM v DEPARTMENT OF CORRECTIONS, No. 164567; Court of Appeals No. 356655.

REIGHARD v CENTRAL MICHIGAN UNIVERSITY, No. 164591; Court of Appeals No. 358196.

JONAITIS v CENTRAL MICHIGAN UNIVERSITY, No. 164593; Court of Appeals No. 358759.

CANGEMI v PRESTIGE CADILLAC, INC, No. 164629; Court of Appeals No. 356069.

Stay Granted November 3, 2022:

O'HALLORAN v SECRETARY OF STATE, No. 164955; Court of Appeals No. 363503. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, the request made in the bypass application to stay the October 20, 2022 opinion and order of the Court of Claims is considered, and it is GRANTED. We ORDER that the October 20, 2022 opinion and order of the Court of Claims, and any decision of the Court of Appeals in this matter, is stayed pending the appeal period for the filing of an application for leave to appeal in this Court, and if an application for leave to appeal is filed from the Court of Appeals decision, until further order of this Court. This order disposes of the defendants' application for leave to appeal.

BERNSTEIN, J. (*concurring*). I agree with the majority's decision to grant a stay in these consolidated cases. I write to explain why.

Justice VIVIANO appears to believe that granting a stay in this case is "a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek." The assumption that we are being driven by a results-oriented agenda is a confusing one at best, given that there are clearly significant legal issues at play here that merit this Court's full attention, which is unfortunately not feasible in the time left before election day. Justice VIVIANO notes that granting a stay here is inappropriate, referring to MCR 7.209(A)(2), but that court rule only speaks in terms of motions to stay filed in the Court of Appeals, where defendants filed a motion to waive the requirements of MCR 7.209. Although they did not file such a motion in this Court, there is nothing in MCR 7.209 to suggest that this requirement extends to this Court.[1] Justice VIVIANO even acknowledges that "our rules do not expressly address the standard applicable to these stays," but in the same breath chastises the majority for not identifying a standard that he admits does not exist and that his dissenting colleague similarly does not apply.

In the interests of full transparency, assuming that the standard Justice VIVIANO has articulated is applicable here, I will briefly explain

[1] Although MCR 7.305(I) states that "MCR 7.209 applies to appeals in the Supreme Court," given that MCR 7.209(A)(2) only speaks in terms of the Court of Appeals, it is unclear what the effect of MCR 7.305(I) is as to that provision. More importantly, MCR 7.209(F) refers to both the Court of Appeals and the Supreme Court, thus suggesting that the reference to the Court of Appeals alone in MCR 7.209(A)(2) is meaningful.

why I believe that a stay is appropriate under these circumstances. Justice VIVIANO notes that there is a four-part test that asks:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken v Holder*, 556 US 418, 434 (2009), quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

First, I believe defendants have made a strong showing that the doctrine of laches could apply to bar the relief that plaintiffs seek. The doctrine is an equitable one, and it may remedy "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (quotation marks and citation omitted). "It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id*., citing *Lothian v Detroit*, 414 Mich 160, 168 (1982); *McGregor v Carney*, 271 Mich 278, 280 (1935); and 11A Callaghan's Michigan Pleading & Practice (2d ed), § 92.12, p 580. In other words, "[t]he doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation." *Mich Ed Emp Mut Ins Co v Morris*, 460 Mich 180, 200 (1999).

The Court of Claims granted injunctive relief as to five of the plaintiffs' challenges to provisions of the election guidance published by the Bureau of Elections.[2] The majority of the challenged provisions at issue were first published in May 2022. Notably, the Court of Claims

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[2] Briefly, the first challenged provision standardizes the form that election challengers must use to be credentialed, whereas political parties formerly used custom forms for their own challengers; the second challenged provision states that challengers may be appointed up to the day before election day, but not on election day itself; the third challenged provision states that challengers may only communicate with a particular election inspector, designated as the challenger liaison, with repeat violations leading to the potential ejection of a challenger; the fourth challenged provision restricts the possession of electronic devices only in absent voter ballot processing facilities while absent voter ballots are being processed with violations subject to ejection (as opposed to polling places, where electronic devices may be possessed subject to certain limitations); and the fifth challenged provision states that impermissible election challenges, defined for example as challenges that are made with respect to something other than a voter's eligibility or challenges that are made on the basis of a prohibited reason, need not be recorded in the poll book.

opinion pointed out that an earlier version of at least one of the challenged provisions was published in October 2020, and "there is nothing in the record to suggest that the manual was challenged in court on these grounds." In the consolidated cases before us, one set of plaintiffs first filed suit in the Court of Claims on September 28, 2022, while the other set of plaintiffs first filed suit in the same court on September 30, 2022. The Court of Claims did not enter its opinion and order until October 20, 2022.

It is clear that some delay took place in both cases, particularly with respect to the challenged provision that existed in a similar form as early as October 2020. The Court of Claims faults the Bureau of Elections for failing to "highlight or redline" the new provisions for the benefit of potential challengers, and it notes that one set of plaintiffs communicated its disagreements with these provisions in July 2022, concluding that "plaintiffs did not simply sit on their hands for four months, as defendants argue." But the doctrine of laches does not ask whether a plaintiff makes just any move in attempting to address the complained-of situation—it specifically asks whether there has been an unreasonable delay in *commencing a legal action*. See *Pub Health Dep't*, 452 Mich at 507.

I also believe that defendants have made a strong showing that this delay would result in prejudice. Defendants note that the guidance is binding on local clerks, and that training based on this guidance for both local clerks and election inspectors has already taken place across the state. It is impractical to think that new training could both be developed and take place the week before the election without a significant use of state resources, even if we assume this is a logistically achievable task within the time frame before us. Although both of my dissenting colleagues deny that any significant changes would be necessary at this point, it seems obvious that they would be—the August 2022 primary election was held with the challenged provisions in place, and a change would need to be made less than a week before the November 2022 general election. To say this would not be disruptive is to ignore reality and basic human behavior.

Accordingly, I believe that defendants have made a strong showing that they are likely to succeed on the merits of their laches defense.

Second, given that the doctrine of laches already incorporates a prejudice requirement, like Justice VIVIANO, I find that this factor follows the first.

The third and fourth factors concern whether there will be substantial injury to other interested parties and where the public interest lies. I begin by noting that defendants have submitted affidavits from current and former elections officials that explain why the challenged provisions are necessary to prevent the intimidation of both voters and election inspectors alike. I believe it more appropriate to defer both to the collective experience of these seasoned professionals and to the legal record that has been developed in this case, instead of inserting my own personal notions of what is efficient or not. Although Justice VIVIANO concludes that the public interest lies in striking the challenged provisions, it is especially noteworthy that these provisions applied to the

August 2022 primary election, and yet there are no claims before us of any sort of havoc or catastrophe that resulted from the use of this guidance in that election.

I would thus find that defendants have met the standard articulated by Justice VIVIANO for a stay.

Moreover, it is important to bear in mind that the relief the Court of Claims granted in these cases was injunctive relief, which "is an *extraordinary* remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9 (2008) (quotation marks and citations omitted; emphasis added). I find it hard to believe that plaintiffs could establish a real and imminent danger of irreparable injury, again in light of the unchallenged administration of the August 2022 primary election. One set of plaintiffs in these cases includes the Michigan Republican Party and the Republican National Committee. I find it puzzling how these plaintiffs could establish a real danger of irreparable injury, given that the challenged provisions apply equally to all would-be election challengers, be they Republican, Democratic, or otherwise.

Given the strong arguments that defendants have made in favor of the application of the doctrine of laches, and given the high standards applicable where plaintiffs request injunctive relief, I vote with the majority to grant a stay in this case. I continue to be confused by the insinuation that "the stakes of this case . . . could not be higher." Of course I believe in the importance of elections in our representative democracy, a statement that I have repeated across a number of election cases over the eight years I have served on this Court. But it remains the case that the August 2022 primary election was conducted without any problems or objections. If August 2nd went smoothly, I have no reason to believe November 8th will be any different.

WELCH, J. (*concurring*). I agree with the Court's decision to stay the legal effect of the Court of Claims' October 20, 2022 opinion and order. I write separately to explain why I believe a stay is appropriate. At issue in this case are several modifications made by the Bureau of Elections to its election manual in May 2022. With respect to the changes in the manual, the parties have competing arguments about the interaction of the Michigan Election Law (MEL), MCL 168.1 *et seq*., and the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Thoughtful consideration and conclusive resolution by the judiciary are warranted on these important issues. But timing matters, especially when a lawsuit contests election procedures and seeks emergency relief just days before an election. See *Purcell v Gonzalez*, 549 US 1, 5-6 (2006); *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016); *New Democratic Coalition v Secretary of State*, 41 Mich App 343, 356-357 (1972).

Specifically, plaintiffs in these two cases raise challenges to an election manual relating to election challengers and poll watchers, which was published by the Michigan Bureau of Elections on May 25, 2022, and announced through a digital news bulletin on the Secretary of

State's website on the same date.[1] It appears to be undisputed that either staff or attorneys of plaintiffs Michigan Republican Party and Republican National Committee have been aware of the 2022 manual since it was issued or shortly thereafter, regardless of when the those parties claim to have realized that the 2022 manual was not identical to the 2020 manual. The record also shows that plaintiff Philip O'Halloran was personally aware of the new provisions in the manual as early as July 2022, as evidenced by e-mails sent by O'Halloran to the Secretary of State raising some of the exact concerns that have been pleaded in these cases. The 2022 manual was in place and relied on by local clerks, election workers, poll watchers, and challengers for the August 4, 2022 primary election. It further appears that plaintiffs O'Halloran, Braden Giacobazzi, Robert Cushman, and Richard DeVisser served as election challengers for the August primary election.

Despite the availability of the 2022 manual since May 2022 and several of the plaintiffs' subjective knowledge of the manual and its contents, the lawsuits in this matter were not filed in the Court of Claims until September 28, 2022, and September 30, 2022. Both groups of plaintiffs claim that aspects of the 2022 manual conflict with the MEL, exceed the legal authority held by defendants to issue election instructions and guidance without first going through formal notice-and-comment rulemaking under the APA, and infringe the statutory rights of designated election challengers under MCL 168.730. Defendants, in response, point both to the statutory authority provided by the MEL and the historic practices of the office of the Secretary of State and the Bureau of Elections. After the Court of Claims largely ruled in favor of plaintiffs on October 20, 2022, defendants immediately requested that the Court of Appeals grant expedited relief or a stay of the Court of Claims' decision no later than October 26, 2022, and requested waiver of the requirement under MCR 7.209(A)(2) that a motion for a stay pending appeal must first be filed in the applicable trial court. The Court of Appeals has yet to issue an order. Accordingly, defendants filed a bypass application in this Court on October 28, 2022, asking the Court to enter a stay of the Court of Claims' decision.[2] The requested stay

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[1] The 2022 manual that is at issue is titled: "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers."

[2] To be clear, the Court of Appeals has yet to rule on the merits of the parties' arguments, and the stay that this Court is putting in place merely prevents the Court of Claims' decision from being enforced immediately. Defendants have not asked this Court to resolve the merits of this dispute at this time. Nor does any Michigan precedent or court rule require an evaluation of the merits of an appeal when deciding whether to grant or deny a stay pending appeal. Regardless of whether this Court should adopt a new general standard for when a stay pending appeal should be granted, we certainly should not adopt such a standard for the first time when an appeal is before the Court in an emergency posture. Thus, rather than engage in a merits analysis on matters that

would ensure that local election workers can rely on the 2022 manual in the November 2022 general election while the courts work through the complex and jurisprudentially significant legal issues presented in these cases.[3]

All parties agree that " '[a] State indisputably has a compelling interest in preserving the integrity of its election process,' " *Purcell*, 549 US at 4 (citation omitted), but they disagree about whether certain provisions of the 2022 manual hinder or help this compelling interest. The United States Supreme Court has long recognized that courts should be cautious in granting injunctive or declaratory relief that will alter election rules or procedures when an election is imminent, there is a need for clear guidance, and there is inadequate time to resolve complex factual or legal disputes relating to important election matters. See *id*. at 5-6. This is especially true where a plaintiff has unreasonably delayed bringing a claim before the court. See, e.g., *Crookston*, 841 F3d at 398 ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent

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are likely to be reviewed by this Court in the future, I believe it most appropriate to look to relevant state and federal precedent concerning delayed legal challenges that relate to election matters. That authority weighs strongly in favor of the Court's decision to grant a stay.

[3] I agree with Justice BERNSTEIN that the procedural posture of this case does not preclude ordering a stay. Defendants' bypass application sought a ruling on their motion to grant a stay and to waive the procedural requirements contained in MCR 7.209(A) that is still undecided and pending before the Court of Appeals. This Court has the authority to entertain such a request both under its general powers and pursuant to MCR 7.303(B)(1), MCR 7.305(C), and MCR 7.316(A)(7). In fact, while this Court denied a bypass application and a request for a stay in *AFT Mich v Michigan*, 493 Mich 884 (2012), it granted the request to waive the procedural requirement under MCR 7.209(A)(2) and (3), as well as the requirements under MCR 7.302(I) (which has since been renumbered as MCR 7.305(I)). *AFT Mich* was before this Court in a different procedural posture given that a separate motion for a stay was filed along with the bypass application, but no motion for a stay had been filed in or denied by the lower courts. We also granted a motion to waive MCR 7.209(A) in *Bailey v Pornpichit*, 722 NW2d 221 (Mich, 2006). And, since the *AFT Mich* order was entered, this Court has denied at least two other requests to waive the procedural requirements of MCR 7.209(A) without suggesting that it lacked the authority to grant such a request. See *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 502 Mich 881 (2018); *Doe v Dep't of Corrections*, 497 Mich 882 (2014). This is not the first time this Court has entertained or granted requests to waive procedural requirements governing requests for a stay, and while granting such requests should be rare, the timing and nature of this election-related matter warrants granting defendants' request.

a powerful reason for doing so."). This is, in essence, the equitable doctrine of laches applied in a unique way to election matters. See *New Democratic Coalition*, 41 Mich App at 356-357 ("We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections."); *Nykoriak v Napoleon*, 334 Mich App 370, 383 (2020) ("The circuit court did not err by finding unexcused or unexplained delay, particularly in light of plaintiff's prior experience with elections.").[4]

As the Sixth Circuit noted in *Crookston*, 841 F3d at 398, whether it be "laches, the *Purcell* principle, or common sense," there are compelling reasons not to disrupt established election processes and procedures on the eve of an election "absent a powerful reason for doing so." No adequate justification exists in these cases. The 2022 manual has been publicly available since May 25, 2022. Since its release, the 2022 manual has been relied on for both training purposes and administration of the August primary election. At least one plaintiff had personal knowledge of the changes implemented by the 2022 manual prior to the August primary, and several plaintiffs served as election challengers for the August primary under the terms provided by the manual. But the lawsuits at issue were not filed until the end of September. Additionally, the November 2022 general election was less than three weeks away when the Court of Claims entered its opinion and order. The general election is now less than one week away. Training for poll workers has been completed. It would be impossible to retrain thousands of workers across our state within a matter of days.

The parties raise compelling legal arguments, and the scope of defendants' power to administer election processes and procedures are jurisprudentially significant. While the parties and the electorate of Michigan deserve definitive answers, I believe the stay in this case will avoid confusion on election day and still allow for the merits of the claims in plaintiffs' lawsuits to proceed through the courts for resolution.

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[4] See also *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (holding that laches "is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party"); 4 Restatement Torts, 2d, § 939, comment *a*, p 576 ("Even during a period less than that prescribed by an applicable or analogous statute of limitations, delay by the plaintiff in bringing suit, after he knew or should have known of the tort may result in relief being denied, wholly or in part, if the delay has operated to the prejudice of the defendant or has weakened the court's facility of administration."); *id*. at § 939, comment *b*, p 577 ("The reasonableness of the delay is tested by asking what should have been expected of one in the plaintiff's position as the menace to his interests from the defendant's conduct developed.").

ZAHRA, J. (*dissenting*). I dissent from the majority's decision to grant a stay.

Defendants[1] filed a motion to bypass[2] the Court of Appeals' jurisdiction[3] asking this Court to overturn the Court of Claims' decision granting DeVisser limited relief in this election case. The underlying matter concerns defendants' May 25, 2022 release and implementation of a publication entitled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (the Manual). Plaintiffs filed lawsuits in the Court of Claims on September 28 and 29, 2022, arguing that the Manual included "rules" that ought to have been promulgated by the Administrative Procedures Act (APA), MCL 24.201 *et seq*. On October 3, 2022, the court consolidated the cases and directed defendants to show cause why relief should not be granted and to file any motions for summary disposition by October 11, 2022. On October 20, 2022, the court issued a 29-page opinion that largely granted the relief sought by the DeVisser plaintiffs and denied the O'Halloran plaintiffs the broader relief sought in that case.[4] The court ruled that defendants were required to promulgate rules under the APA in regard to the Manual's requirements that: (1) poll watchers use a uniform credential form supplied by the Secretary of State, (2) poll watchers must be appointed or credentialed no later than the day before election day, (3) poll watchers may only communicate with an appointed "challenger liaison," as opposed to communicating with any election inspector, (4) poll watchers are prohibited from possessing electronic devices in absent voter counting board facilities, and (5) so-called "impermissible challenges" to a person's eligibility to vote not be recorded in the poll book. The Court of Claims also rejected defendants' laches defense, concluding that plaintiffs acted with reasonable diligence and that defendants failed to demonstrate prejudice.

The Court of Claims provided defendants some discretion in how to proceed:

> Under MCR 2.116(I) and MCR 2.605, the Court concludes that the DeVisser Plaintiffs' claims set forth in Paragraph 30 of their complaint are well-founded in fact and law, and, as a result, the Court declares that defendants have violated the Michigan Election Law and the APA, as explained in this Opinion and Order. The May 2022 Manual, in and of itself, does not have the force and effect of law and defendants are enjoined from using or

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[1] I refer to defendant Secretary of State and defendant Director of the Bureau of Elections collectively as "defendants" and specify the Secretary of State when referring to that party in the singular.

[2] See MCR 7.303(B)(1) and 7.305(C)(1).

[3] Defendants' claim of appeal and motion to stay the Court of Claims' decision remain pending in the Court of Appeals.

[4] In this procedural posture, the additional relief sought by DeVisser and O'Halloran that the Court of Claims denied is not at issue.

> otherwise implementing the current version of the May 2022 Manual to the extent that such enforcement, use, or implementation would be inconsistent with this Opinion and Order.

Defendants appealed and filed a motion to stay the Court of Claims' judgment, but the Court of Appeals has not yet taken action. Defendants now seek relief from this Court through a bypass application.

Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."[5] A "rule" not promulgated in accordance with the APA's procedures is invalid.[6] An agency must use formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program."[7] "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed."[8] It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA.[9]

This is not the first time that the Secretary of State has claimed to merely be issuing "instructions" to justify the lack of open and transparent promulgation of rules under the APA. The same claim was made before the 2020 general election. Yet, in March 2021, the Court of Claims issued an opinion that held, "[i]n sum, the standards issued by defendant [Secretary of State] on October 6, 2020, with respect to signature-matching requirements amounted to a 'rule' that should have been promulgated in accordance with the APA. And absent compliance with the APA, the 'rule' is invalid."[10] In the present case, the Court of Claims carefully and reasonably reviewed the challenges and found each to be in conflict with statutory law concerning the credentialling of poll watchers and their conduct during the election. At this stage of these proceedings, I cannot conclude that a stay of the Court of Claims

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[5] MCL 24.207.

[6] MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205 (1982).

[7] *Faircloth v Family Independence Agency*, 232 Mich App 391, 404 (1998).

[8] *American Federation of State, Co, & Muni Employees v Dep't of Mental Health*, 452 Mich 1, 10 (1996) (*AFSCME*).

[9] *In re Pub Serv Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263 (2002).

[10] *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), p 14.

judgment should enter. Indeed, it appears likely that defendants have once again chosen to implement "rules" under the guise of "instruction."

Under MCL 168.31(1)(a), the Secretary of State shall "issue instructions and promulgate rules pursuant to the [APA] for the conduct of elections and registrations in accordance with the laws of this state." Defendants undisputedly did not promulgate revisions to the Manual pursuant to the APA, and they argue that they were not required to do so because the revisions were only instructional. Yet, defendants assert that "the instructions are binding on local clerks, MCL 168.21, MCL 168.31(1)(a)-(c), who in turn have the obligation to train all election inspectors on Election Day procedures pursuant to those instructions, including the procedures related to challengers and the challenge process, MCL 168.31(1)(c), (i), (m)." Defendants cannot have it both ways. While defendants maintain that the Manual was revised to provide mere instructions, those instructions became manifest when actually implemented and put into practice during the August 2, 2022 primary. At that point, plaintiffs could cite the revisions to the Manual and claim the revisions were not merely instructional, they were in fact rules that were required to be promulgated under the APA to have the effect of law.[11]

Further, because the rules were first implemented during the August 2, 2022 primary, I am hard-pressed to conclude that a lawsuit filed eight weeks after the primary and six weeks before the general election shows an unexcused or unexplained delay in commencing an action. Nor am I convinced that defendants have shown prejudice because of an allegedly late filing.[12] Surely, the Secretary of State was aware that these proposed instructions might later be challenged as rules that must be promulgated under the APA. As mentioned, a very similar challenge occurred during the Secretary of State's tenure, just a year before the Manual was revised.[13]

Obviously, the more prudent and transparent manner of revising the Manual is to simply promulgate the rules under the APA. For this reason, defendants do not arrive at this Court with clean hands to claim

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[11] See *AFSCME*, 452 Mich at 12 (recognizing that the Department of Mental Health did not need to take a certain action; however, once the department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule").

[12] There is a statutory rebuttable presumption of laches in cases brought within four weeks of an election. MCL 691.1031. Plaintiffs avoided this presumption by filing their claims six weeks prior to the general election. Election litigation will always be expedited. But I have consistently maintained that six weeks is a sufficient amount of time to consider matters that will affect an election, such as the collection and tabulation of ballots. See *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1016 (2022) (ZAHRA, J., concurring).

[13] See note 10 of this statement and accompanying text.

they are prejudiced by a judicial decision that they were entirely able to avoid. In fact, the majority's decision to grant a stay will only enable defendants to continue this practice. Further, I seriously question defendants' claim that significant retraining will be required without the stay. The Court of Claims' judgment is narrowly tailored to five concerns. These concerns relate to revisions of the Manual addressing practices that had been permitted in prior elections. Thus, seasoned poll workers will need only be informed that they should revert to their prior practices. In sum, officials need not require a uniform credential form, poll watchers may be credentialed the day of the election, poll watchers may communicate with any election inspector, poll watchers may possess electronic devices in absent voter counting board facilities, and challenges to a person's eligibility to vote must be recorded in the poll book. Given that this was the practice for a significant amount of time before the August 2, 2022 primary, following this directive hardly strikes me as something on which significant retraining is required, if any at all. For these reasons, I would deny the stay.

VIVIANO, J. (*dissenting*). We live in a political age where one side claims our "democracy is at stake" because the other is questioning the integrity of our elections—an age-old and seemingly bipartisan tradition. See Foley, *Ballot Battles: The History of Disputed Elections in the United States* (New York: Oxford University Press, 2016). Therefore, the stakes of this case—which will affect how this year's election is administered—could not be higher. But you would not know it from the majority's treatment of the case. The majority's order, which is barren of any legal analysis or discussion, stays the trial court's decision enjoining enforcement of changes made by defendant Secretary of State to the 2022 Election Manual (hereafter "Manual") to regulate the conduct of the upcoming election. In doing so, the majority disregards our court rules and the basic need to provide reasoned, principled decisions. And it has almost certainly ensured that the present election will not be governed by Michigan law as interpreted by the only court to rule on the merits of this election dispute.

Instead, under the general principles governing stays, I would reject defendants' motion for a stay, as I believe defendants have not shown sufficient likelihood of success on the merits or that they would be irreparably harmed by enforcement of the trial court's order.

I. FACTS AND PROCEDURAL HISTORY

These cases start with the Election Manual itself, and the recent changes to it. Under MCL 168.31(1)(c), the Secretary of State must "[p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on . . . procedures and forms for processing challenges . . . ." The Secretary of State must also "develop instructions consistent with [the Michigan Election Law, MCL 168.1 *et seq*.] for the conduct of absent voter counting boards or combined absent voter counting boards." MCL 168.765a(13). Those instructions "are binding upon the operation of an absent voter counting board or combined

absent voter counting board used in an election conducted by a county, city, or township." *Id*. In May 2022, the Secretary of State issued a substantially new version of the portion of the Election Manual pertaining to election challengers and poll watchers.[1]

The first major change related to the credentials for election challengers. The relevant statute provides that the challenger must have an "[a]uthority signed by the recognized chairman or presiding officer" of a political party or certain other groups—and that this authority "shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept . . . ." MCL 168.732. Past election manuals have not required anything more than what is required by this statute. But in the present Manual, the Secretary of State has attempted to define the "authority" mentioned in the statute as a "Michigan Challengers Credential Card," which must appear "on a form promulgated by the Secretary of State."[2] "If the entire form is not completed," the Manual warns, "the credential is invalid and the individual presenting the form cannot serve as a challenger."[3]

The next changes deal with a new position created by the Secretary of State: the challenger liaison. Election challengers have statutory authority to "[b]ring to an election inspector's attention" various problems, such as improper ballot handling or violations of election law. MCL 168.733(1)(e). Past manuals have provided for election officials to supervise these challenges. The 2020 manual, for example, provided that certain challenges "must be directed to the chairperson of the

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[1] An electronic version of the Manual appears on the Secretary of State's website. The updated portion at issue here—titled *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*—seems to replace a portion of the Manual; however, the online version of the manual does not reflect this update and instead reports that the relevant section of the Manual was last updated in October 2020. Michigan Secretary of State, *Election Administrator Information* <https://www.michigan.gov/sos/elections/admin-info> (accessed November 2, 2022) [https://perma.cc/NXB6-UVV6] (see the boldface heading "Election Officials' Manual / Accreditation Study Guide" and under that heading the link to Chapter 11, which concerns "Election Day Issues," indicating that the linked material was last updated in October 2020). The updated portion at issue is not included with the Manual but is provided under a separate heading and is not identified as part of the Manual.

[2] Michigan Secretary of State, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p 4, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=96200bfb95184c9b91d5b1779d08cb1b&hash=2CE1F512E8D7E44AFAF60071DD8FD750> (accessed November 3, 2022) [https://perma.cc/GL8Z-GLSK].

[3] *Id*. at 4-5.

precinct board . . . ."[4] The current Manual, by contrast, prohibits challengers from even speaking with anyone other than the liaison: "Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee," unless instructed otherwise.[5] Violation of this, or any other instructions, will lead to a warning, followed by possible ejection.

The third change is to the possession of electronic devices. No statute speaks to whether challengers can possess such devices. However, the Legislature has prohibited challengers from communicating information relating to the processing or tallying of votes until the polls close. MCL 168.765a(9). Past manuals have prohibited the use of electronic devices but never their mere possession. The present Manual, however, bans possession in absent voter ballot facilities while absent voter ballots are being processed.[6]

The final change is to recording challenges. By statute, registered electors of a precinct can "challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct." MCL 168.727(1). If such a challenge is made, the election inspector must "[m]ake a written report including" various information. MCL 168.727(2)(b). The statute further prohibits challenges made "indiscriminately and without good cause" and provides that a challenger who makes challenges "for the purpose of annoying or delaying voters is guilty of a misdemeanor." MCL 168.727(3). The 2022 Manual has created a new class of challenges, what it deems "impermissible challenges": those made on improper grounds, such as to something other than the voter's eligibility.[7] "Election inspectors are not required to record an impermissible challenge in the poll book," according to the Manual.[8]

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[4] Michigan Department of State, Bureau of Elections, *Election Officials' Manual* (October 2020), ch 11, p 32, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/XI_Election_Day_Issues.pdf?rev=dca6cfa2f9dd422a8444825a521324b8&hash=E80A0F3EDFF7F288B13ECA626E380237> (accessed November 2, 2022) [https://perma.cc/F3RB-9ME5].

[5] *Appointment, Rights, and Duties* (May 2022), p 6 (boldface omitted).

[6] *Appointment, Rights, and Duties* (May 2022), p 9.

[7] The 2003 manual distinguished between "proper" and "improper" challenges but did not purport to absolve election inspectors of their duty to record the challenge or threaten challengers with expulsion for making these challenges. The 2003 manual did, however, allow the precinct chairperson to expel challengers who "abuse[d] the challenge process." This provision does not appear to have been continued in subsequent manuals.

[8] *Appointment, Rights, and Duties* (May 2022), p 10 (boldface omitted).

Plaintiffs sued, seeking to enjoin these aspects of the Manual, among other requested relief. The Court of Claims agreed. It noted, at the outset, that the Secretary of State's instructions were not promulgated as rules under the Administrative Procedures Act, MCL 24.201 *et seq*. Therefore, as defendants acknowledged, they did not have the force and effect of law. With regard to the Secretary of State's credential form, the court explained that "our Legislature expressly set out the 'evidence' needed to show that a person was properly credentialed as a challenger" in MCL 168.732. The Secretary of State could not add to the requirements by mandating the use of a particular form.

With regard to the challenger liaison, the Court of Claims stated that "[t]he authority to designate a 'challenger liaison' is absent from the Michigan Election Law—in fact, the very label appears nowhere in the statute." No sources were cited, the court observed, to support this restriction of the challengers' statutory "right to communicate to 'an' election inspector . . . ." Therefore, the restriction was inappropriate. Next, in relation to electronic devices in the absent voter counting board facilities, the court again noted the lack of statutory authority supporting the change. The Legislature restricted communications made by challengers regarding the processing of absentee ballots, but it did not prohibit possession of electronic devices, even though it would have been very easy to do so. "Prohibiting electronic devices in the [absent voter counting board] facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule." Therefore, the restriction was impermissible.

Finally, the court enjoined enforcement of the "impermissible" challenges provision. The court noted that nothing in MCL 168.727(2) gave election inspectors discretion to decline to record a challenge made to the voting rights of a person. This contrasted with other types of challenges and actions that election challengers were entitled to make, such as many of those under MCL 168.733.[9] Nor did defendants cite any authority for the proposition that a challenger could be ejected for making impermissible challenges. Consequently, the Manual veered from the statutes and could not be enforced.[10]

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[9] For example, MCL 168.733(1)(d) provides challengers the right to "[c]hallenge an election procedure that is not being properly performed." MCL 168.733(1)(c), by contrast, involves challenges to voting rights under MCL 168.727, which do require reports.

[10] Plaintiffs also challenged language in the Manual providing that "[p]olitical parties eligible to appear on the ballot may appoint or credential challengers at any time *until* Election Day." Defendants acknowledged, however, that MCL 168.730 and MCL 168.731 permit appointment through election day itself. The Court of Claims required defendants to make this amendment to the Manual. Because defendants conceded this issue, and because the Court of Claims' decision appears plainly correct, I will not address it below.

The court also rejected defendants' laches argument, i.e., that plaintiffs unduly delayed suit to the prejudice of defendants. It explained that the plaintiffs "did not simply sit on their hands for four months" after the Manual was issued in May 2022. Further, the court found no evidence that defendants would be prejudiced by any delay in bringing the case. The Manual is almost entirely instructive, rather than enforceable, the court observed, and could be easily tweaked on the few points where it went astray.

Defendants then appealed in the Court of Appeals, filing a motion to stay the Court of Claims judgment. The Court of Appeals has not yet ruled. Defendants now seek to bypass the intermediate appellate stage and come straight to this Court. They ask that this Court grant the bypass application and stay enforcement of the Court of Claims judgment.

II. PROCEDURES AND STANDARDS FOR A STAY

A. MCR 7.209

The majority has found a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek. Instead of addressing the merits of this election-emergency case prior to the election, or doing anything that ensures the merits will be addressed on appeal by then, the majority simply stays all lower court decisions in this case until after the Court of Appeals issues a decision and after we have subsequently disposed of the case. With less than one week to go before the election, there is little prospect of the case being finally resolved before election day. The election will likely come and go with the Secretary of State's challenged Manual firmly in place, even though the only court to rule on the merits found it contained new provisions that exceeded the Secretary of State's authority.

The majority tramples over the court rules allowing us to order a stay. MCR 7.209, which addresses stays for cases on appeal in the Court of Appeals, applies to appeals in this Court. See MCR 7.305(I). Under MCR 7.209, a party can seek in the Court of Appeals to stay the effect or enforceability of a trial court's judgment *if* a stay bond or motion for a stay pending appeal was decided by the trial court. MCR 7.209(A)(2) ("A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court."). The Court of Appeals "may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just." MCR 7.209(D).

In the present case, it does not appear that defendants ever moved for a stay in the trial court (here, the Court of Claims), and the trial court never decided the issue. Thus, under MCR 7.209(A)(2), defendants were prohibited from even filing a motion for a stay in the Court of Appeals. Yet they did just that, along with a request to waive the requirements in MCR 7.209(A)(2). But nothing in MCR 7.209 suggests that courts have the power to waive this threshold requirement. Nor

does the majority's order suggest that it is granting the waiver or provide any reasons for doing so. And in seeking a bypass application here, defendants only sought entry of a stay—they did not even seek a waiver of MCR 7.209(A)(2)'s requirements. Thus, even if courts can absolve parties of legal requirements that the parties admit noncompliance with, it does not appear that this stay motion is properly before this Court.

B. STANDARDS FOR ENTERING A STAY

More amazing still, the majority accomplishes its result, in an important case affecting the statewide rules governing the upcoming election, without any pretense that it must justify the stay by giving reasons based in law. This is in tension with the constitutional requirement that our "[d]ecisions . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ." Const 1963, art 6, § 6. Often, this constitutional provision does not require much. Many of our cases are decided or resolved in short orders. But more is called for here, at the very least as a prudential matter. In a case of this magnitude, when the Court is halting a decision by a lower court—the only court to have considered the merits thus far—in a manner that will affect the conduct of the election and almost certainly will deprive plaintiffs of relief in this election, I believe the Court should provide at least some legal rationale for its decision.

Compounding this problem is the lack of any clear standard being applied by the majority in cases involving stays of lower court orders. To be sure, our rules do not expressly address the standard applicable to these stays. MCR 7.209(D)—which is applicable to this Court under MCR 7.305(I)—allows an appellate court to stay enforcement of trial court judgments on "terms it deems just." And neither has this Court established a standard, having ordered stays in the past without any rationale—a practice I have occasionally dissented from. *Sheffield v Detroit City Clerk*, 507 Mich 956, 957 (2021) (VIVIANO, J., concurring in part and dissenting in part).

Without any standard whatsoever, these stays are essentially arbitrary, as far as the parties and public are concerned. It might be that the majority favors the arguments of one side or the other, or prefers a particular political outcome, or enters a stay because it is Tuesday. This lack of any discernable standard being applied by the Court in these cases conflicts with the nature of judicial decisionmaking. Principled judicial decisionmaking requires a reasoned application of general principles and laws applicable to the present case and like cases. Cf. Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993), pp 3-4. If a judge cannot discover such principles that yield his or her desired result, it usually means those principles do not exist. *Id*. To give no basis for a decision means that the judges might have acted for *any* reason, good or bad, principled or unprincipled. As the United States Supreme Court has explained, an appellate court's ability to hold a lower court order in abeyance pending an appeal is an inherent power within the discretion of the court—but this " 'does not mean that

no legal standard governs that discretion. . . . "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." ' " *Nken v Holder*, 556 US 418, 434 (2009), quoting *Martin v Franklin Capital Corp*, 546 US 132, 139 (2005) (citation omitted; alterations in original).

The majority identifies no standard and provides no reasoning for its decision to stay this case. Nor could I identify any "sound legal principles" supporting its conclusion. In this regard, it has been observed that the nature of the question whether to enter a stay in these circumstances is equitable. See *Daly v San Bernardino Co Bd of Supervisors*, 11 Cal 5th 1030, 1054 (2021) (noting "the essentially equitable nature of the stay pending appeal" and observing that many courts apply equitable considerations). The United States Supreme Court has articulated the widely followed test for stays pending appeal:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken*, 556 US at 434, quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

Many, if not most, other courts follow this standard or something like it.[11] In the present case, moreover, defendants have analyzed their request for a stay under these same basic factors. I believe this four-part standard applies to stays sought under MCR 7.209 and, unlike the majority, would apply it in the present matter.[12]

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[11] See Or Rev Stat 19.350(3) (enacting four factors similar to the federal standards); Nev R App P 8(c) (same); *Ex parte Krukenberg*, 252 So 3d 676, 678 n 1 (Ala Civ App, 2017) (using federal-standard factors); *Smith v Arizona Citizens Clean Elections Comm*, 212 Ariz 407, 410 (2006) (same); *Romero v City of Fountain*, 307 P3d 120, 122 (Colo App, 2011) (adopting federal standards); *State v Gudenschwager*, 191 Wis 2d 431, 440 (1995) (using the federal standards); *Reading Anthracite Co v Rich*, 525 Pa 118, 125 (1990) (applying the federal standards); *Purser v Rahm*, 104 Wash 2d 159, 177 (1985) (applying a different test that similarly examines the "equities of the situation"); see generally 4 CJS, Appeal and Error, § 530 (Oct 2022 update) ("A party requesting a stay pending appeal must show a likelihood of prevailing on the merits, irreparable injury in the absence of the stay, and that a stay will not substantially harm other interested parties nor harm the public interest.").

[12] Another very concerning aspect of the majority's order is its highly unusual end-to-end scope of coverage. In a normal case, this Court might stay a trial court decision pending a decision by the Court of Appeals. Here, by contrast, this Court has ensured that the Court of

III. APPLICATION

A. LIKELIHOOD OF SUCCESS ON THE MERITS

The first question is whether defendants have shown a likelihood of success on the merits. There are two parts to this question. First, have defendants demonstrated that the trial court erred in its analysis of the statutory provisions and the Secretary of State's violations of them? Second, even if not, have defendants demonstrated a likelihood of success on the merits of their laches defense? For the reasons that follow, I find that this factor weighs against the stay.

1. STATUTORY VIOLATIONS

On the statutory issues, the trial court thoroughly assessed each argument, and I agree with its analysis. The trial court's analysis of the credential-form issue accurately determined that this new provision added requirements beyond what the statutes provided. In this Court, defendants contend that MCL 168.732 does not explicitly allow individual groups to use their own challenger cards, whereas MCL 168.31(1) gives the Secretary of State authority to create a manual "that includes procedures and forms for processing challenges." Defendants' argument ignores MCL 168.731(1), which allows the opportunity for certain other groups—"incorporated organization[s] or organized committee[s] of interested citizens other than political party committees authorized by this act"—to seek appointment of challengers. In applying to appoint challengers, the group must submit, among other things, "a facsimile of the card to be used" by the challenger. *Id*.

The Secretary of State's credential-form requirement applies to all challengers, not just challengers appointed by political parties. That clearly contradicts MCL 168.731(1). And it would make little sense for the nonpolitical-party challengers to use their own cards whereas political-party challengers cannot. Any distinction between MCL 168.731 and MCL 168.732 is not an invitation to the Secretary of State to use her authority under MCL 168.31(1) to add new requirements onto political-party challengers. Although she has the obligation to furnish a manual providing forms, nowhere does she have authority to make the use of those forms mandatory such that, even if a challenger satisfies all other statutory requirements, the challenger can be removed for failure to use the Secretary of State's preferred form. Indeed, as she admits, the Manual lacks the force of law—so how can it require outcomes different from those mandated by statute?

Appeals will not be able to interfere even if it carefully considers the matter and issues an opinion founded on solid legal grounds. Blunting the impact of any action by the Court of Appeals sight-unseen, without this Court providing any legal basis for doing so, appears to be unprecedented.

The challenger-liaison requirement has even less support. As the trial court observed, the statute allows challengers to bring their challenges to "an election inspector[]." MCL 168.733(1)(e). Defendants argue that "an election inspector" does not mean " *any* election inspector." That may be true, but the Manual goes well beyond that. As noted above, past manuals have channeled certain challenges to certain officials. Requiring that a challenge ultimately be handled by a certain individual is arguably consistent with the statutory language and defendants' observation. But the Secretary of State's rule precludes all communication between challengers and inspectors other than the liaison. It imposes a restriction on challengers that is nowhere found in the statutes and that can lead to the challengers' ejection. The Secretary of State's power under MCL 168.31(1)(c) to issue nonbinding procedures for challenges cannot encompass the power to create extrastatutory rules that result in the expulsion of otherwise legally present challengers.

The prohibition on electronic devices likewise impermissibly adds to the statutory requirements. As the trial court noted, the Legislature carefully calibrated the prohibitions in this area, prohibiting communications about the absent-ballot processing but nowhere prohibiting electronic devices. Defendants' argument in this Court boils down to the proposition that to effectuate the prohibition on outside communications—a prohibition that was first enacted in 1965 PA 331—the Secretary of State must now prohibit electronic devices. If that is so, it is a policy choice for the Legislature to make and not for the Secretary of State to decree.[13]

Finally, I agree with the trial court's analysis of the impermissible challenges. MCL 168.727(1) provides that any registered elector can challenge an individual's right to vote "if the elector knows or has good reason to suspect that individual is not" a registered voter. If such a challenge is made, the election inspector "shall" record it. MCL 168.727(2). Nothing in the statute purports to give election inspectors the discretion to determine sua sponte whether a challenge is permissible or not. This gives the inspector the power to eliminate any record of the challenge, and therefore any opportunity to review this determi-

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[13] This is not the first time a party has claimed that the Secretary of State has exceeded her limited powers as an executive branch official. See, e.g., *Davis v Secretary of State*, 506 Mich 1022 (2020) (challenging the Secretary of State's last-minute directive banning the open carrying of firearms at polling places on election day); *Davis v Secretary of State*, 506 Mich 1040, 1040 (2020) (VIVIANO, J., dissenting) (challenging the Secretary of State's unsolicited mass mailing of absentee ballot applications); *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM) (determining that the Secretary of State's instructions regarding signature-matching requirements constituted a rule that should have been promulgated under the Administrative Procedures Act).

nation in the future. The Secretary of State has erected categories of challenges with discrete requirements that find no support from the statutes.[14] And, yet again, the Secretary of State has added a basis for expulsion of challengers.

For these reasons, and those given by the trial court, I conclude that defendants have little chance of success on the merits of their statutory arguments.

2. LACHES

Defendants also contend that plaintiffs' entire cases are barred by laches. The trial court's application of the legal doctrine is reviewed de novo, but any findings of fact supporting its decision are reviewed for clear error. *Shelby Charter Twp v Papesh*, 267 Mich App 92, 108 (2005). Defendants do not explain why the trial court's factual determinations regarding the ease of rectifying the Manual are clearly erroneous.

More importantly, I agree with the trial court's conclusion that laches does not apply. Laches is an equitable doctrine that applies to prevent a party from proceeding to seek enforcement of a legal right. *Nykoriak v Napoleon*, 334 Mich App 370, 382-383 (2020). Laches applies when the party has failed to take timely action *and* the opposing party can demonstrate that it was prejudiced as a result. *Id*. at 382. This Court has emphasized, time and again, that delay alone is not enough —prejudice is essential. As we reiterated in *Kaiser v Kaiser*, 213 Mich 660, 661 (1921):

> "[M]ere lapse of time does not necessarily constitute laches. As a rule it involves other considerations. It means that negligence or omission to assert a right which, considering the lapse of time in connection with other facts and circumstances prejudicial to the

[14] At best, defendants might claim that the recording requirement is contingent on a challenge being made pursuant to MCL 168.727(1), and that a challenge made pursuant to that subsection must be one in which the challenger knows or has good reason to suspect the voter is ineligible to vote. In other words, the recording requirement is inapplicable if the challenger lacks knowledge of or good reason to suspect the voter's ineligibility. Such an interpretation, however, would seem to stretch the text beyond its limits. How is the inspector to discern, upfront, whether the challenger knows or has good reason to suspect ineligibility? The inspector could not determine this unless he or she prejudged the challenge. And again, there is nothing in the statute suggesting that inspectors wield this level of discretion. In any event, the Secretary of State has not attempted to justify her Manual on this interpretation, nor could she: the Manual's categories of impermissible challenges and various subcategories of challenges is far too detailed to find any support in the statute.

> interests of the adverse party, render it unjust and inequitable to recognize such right when finally asserted. * * * Where the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot as a rule be recognized." [Quoting *Walker v Schultz*, 175 Mich 280, 293 (1913).]

See also *Dunn v Minnema*, 323 Mich 687, 696 (1949) ("This Court has repeatedly held that mere delay in attempting to enforce a right does not constitute laches, but that it must further appear that the delay resulted in prejudice to the party claiming laches of such character as to render it inequitable to enforce the right."). Other courts have emphasized that "the prejudice must be *material* before laches will bar relief." *State ex rel Pennington v Bivens*, 166 Ohio St 3d 241, 247 (2021) (emphasis added).

While, in the context of elections, promptness is critical, this is generally because courts do not wish to "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results . . . ." 29 CJS, Elections, § 459 (Oct 2022 update). But in other contexts, one court has observed, "a laches defense 'rarely prevails in election cases.' " *Bivens*, 166 Ohio St 3d at 247 (citation omitted) (noting that the defense typically applies in election cases involving absentee voter rights). The Michigan Legislature has provided for laches in the election setting: "In all civil actions brought in any circuit court of this state affecting elections, . . . there shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected." MCL 691.1031. Although this provision leaves open the possibility of finding laches in earlier-filed suits, it nevertheless indicates the Legislature's view of when this doctrine generally should apply.

The present cases were brought in September 2022, before the time frame in MCL 691.1031, and thus no rebuttable presumption of laches arises. Moreover, as Justice ZAHRA observes, the lawsuits came just eight weeks after these new rules were implemented in the August 2022 primary. And this is not a case in which the outcome will directly affect a candidate's placement on the ballot or an elector's ability to vote. The challenged amendments to the Manual do not relate to the substantive grounds for challenging voters. The effects of these changes do not imperil voters' rights.

Even assuming that there was delay in bringing these suits, I do not believe that defendants have been sufficiently prejudiced. As the trial court noted, defendants admit that the Manual is not binding and has no legal effect, especially to the extent it is in conflict with statutory laws. As such, tweaking the handful of offending changes in the Manual would not change the substance of anything with which local elections officials *must* comply. Moreover, the changes themselves would be minor and would generally restore the status quo from before May 2022. Plaintiffs have, in fact, proposed a supplement, roughly one page in length, to the Manual that would bring it into compliance with the

statutory requirements and the Court of Claims order. Instead of taking this simple step, defendants have expended much time and effort appealing the court's decision.

Defendants focus their prejudice argument on the difficulty of disseminating an updated manual and training local officials on it. On the first issue, they point to an affidavit by the Director of Elections stating that "the Bureau of Elections cannot *publish, print, and distribute statewide thousands of copies of the Election Procedures Manual at this date* . . . ." As an initial matter, it appears that in 2020, an updated version of the manual was furnished in October, shortly before the election. And defendants have not identified any law that requires the printing and physical distribution of entirely new manuals. The statute simply requires the Secretary of State to "[p]ublish and furnish" the instructions. MCL 168.31(1)(c). Defendants offer no reason why this could not be accomplished electronically. Even if printing is required, defendants could certainly provide a short, one-page supplement in line with what plaintiffs have proposed.

As for training, defendants cite the director's summary assertion that further in-person trainings would be impossible at this point. That may be so, but it is unclear why *in-person* trainings are necessary at all. For her part, the Detroit City Clerk, as amicus curiae, has provided an affidavit from a consultant for the city's Department of Elections that simply states that retraining would cause confusion, not that it is impossible. It is difficult to see how the narrow changes to the Manual, which simply bring it in line with statutes that have been on the books for years, would be onerous to describe or confusing to understand. Staff would need to be instructed that: (1) challengers do not need to use the Secretary of State's prescribed credential form; (2) challengers are not prohibited from bringing their challenges to election inspectors other than the challenger liaison; (3) challengers can possess electronic devices; and (4) election inspectors must record all challenges as they have in the past, pursuant to MCL 168.272, and not under the byzantine system created by the Secretary of State. The changes, if anything, lighten the staff's load by relieving them of enforcing an additional layer of restrictions atop those imposed by the statute. Any disruption ultimately emanates from the Secretary of State's decision to depart from the statutes and the general practices encapsulated in past manuals.

For these reasons, I conclude that defendants have not made a strong showing that they are likely to succeed on the merits of their laches defense.

B. IRREPARABLE HARM

In light of my analysis of the laches argument, I believe that defendants will suffer little harm in complying with the law, let alone irreparable harm. Thus, I find that this factor weighs against a stay.

C. INJURY TO OTHERS AND THE PUBLIC INTEREST

The final two factors can be considered together, as defendants have put forward broad policy grounds to support the Secretary of State's changes to the Manual. Generally, defendants cite the need for efficiency and security in the election process. On their face, the Secretary of State's changes limit the ability of election observers to challenge the integrity of the election and make the vote-counting process less transparent. The Secretary of State has imposed extrastatutory requirements, the violation of which will lead to an otherwise legally authorized challenger's removal. The changes further imperil statutorily required records by creating a system of permissible and impermissible challenges that essentially forces election inspectors to adjudicate the merits of the challenge before deciding whether they even need to record it at all. It is also unclear how efficiency will be increased by creating a potential bottleneck by forcing all challenges to funnel through the challenger liaison.[15]

The state has made do without these innovations in the past. Indeed, the Secretary of State trumpeted the "accuracy, security and integrity of the November 2020 election," calling it "the most secure in history . . . ."[16] But it may prove more difficult to adjudicate any postelection challenges when the opportunity for making or recording challenges is circumscribed on the frontend. As for security, the Secretary of State has publicly stated that there have been "no significant attempts" in Michigan to disrupt polling places on election days in the past.[17] While defendants and some amici have noted that there have been many new applications for challengers for the upcoming election, they have not provided any evidence that these challengers threaten violence. And the statutes already provide solutions for expulsion of challengers engaging in "disorderly conduct." MCL 168.733(3). Further, at polling

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[15] The Manual requires only a single liaison at every polling place or absent voter ballot processing facility—more can be appointed, but nothing requires additional liaisons. Many cities have a single facility for processing absentee ballots, and the Legislature allows municipalities to combine their absent voter boards. MCL 168.764d. Consequently, these facilities could involve a large number of precincts but, apparently under the Secretary of State's proposal, would need to be staffed with only a single liaison.

[16] Michigan Secretary of State, *More than 250 Audits Confirm Accuracy and Integrity of Michigan's Election*, <https://www.michigan.gov/sos/Resources/News/2021/03/02/more-than-250-audits-confirm-accuracy-and-integrity-of-michigans-election> (accessed November 2, 2022) [https://perma.cc/RBP7-UGFQ].

[17] CBS News, Transcript: Michigan Secretary of State Jocelyn Benson on "Face the Nation" (September 4, 2022) <https://www.cbsnews.com/news/jocelyn-benson-face-the-nation-transcript-09-04-2022/> (accessed November 2, 2022) [https://perma.cc/T5X7-L8HT].

places, "[e]ach board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands . . . ." MCL 168.678.

Related concerns are transparency and accountability.

> [J]ust as Secretaries [of State] must work to serve the voters and citizens of their state, voters also have a responsibility to hold these statewide elections officials accountable to promoting those two sides of the . . . democracy coin . . . . Voters who wish to see elections that are accessible to all and produce accurate reflections of the people's will cannot overlook their important role in the process. In most states, voters hold the keys to ensuring their state's chief elections official oversees the elections process in a fair, transparent, and judicious manner. [Benson, *State Secretaries of State: Guardians of the Democratic Process* (New York: Routledge, 2010), p 147.]

As amicus Citizens United explains, our statutes foster these interests by allowing election challengers. The Legislature has expressly allowed designation of challengers by certain groups "interested in preserving the purity of elections and in guarding against the abuse of the elective franchise . . . ." MCL 168.730(1); see also Const 1963, art 2, § 4(2) ("Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."). These very interests are threatened by the extrastatutory restrictions placed upon challengers, who (1) will not be admitted unless their credential is on a certain form, (2) may not have adequate access to election inspectors to raise challenges, (3) are deprived of their cellphones, (4) may not have their challenges recorded, and (5) are threatened with expulsion for noncompliance.[18]

For these reasons, I believe the public interest weighs against a stay.

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[18] Justice BERNSTEIN anticipates that because the Secretary of State's new instructions did not cause significant disruption to the primary election, the general election will similarly proceed without incident. I hope he is right. But voter turnout in general elections is generally much higher than turnout in primary elections. Just over two million Michiganders voted in the 2022 primary election. See Michigan Secretary of State, *2022 Michigan Election Voter Turnout* <https://mielections.us/election/results/2022PRI_CENR_TURNOUT.html> (accessed November 3, 2022) [https://perma.cc/VMU2-BANM] (showing that 2,167,798 voters participated). If the past few elections are any indication, we can expect at least twice as many voters to cast their ballots during this year's general election. See Michigan Secretary of State, *Election Results and*

IV. CONCLUSION

In sum, I believe that defendants have not met the appropriate standard for a stay, and I would deny their motion accordingly. None of the relevant factors weighs in favor of the stay. The result of the majority's order is that the Secretary of State's changes to the Manual —even though found improper by the only court to consider them—will apply in the upcoming election. Defendants have thus been handed a victory for this election, when it matters most. Because a stay is unwarranted, I dissent.

DEVISSER V SECRETARY OF STATE, No. 164956; Court of Appeals No. 363505. On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, the request made in the bypass application to stay the October 20, 2022 opinion and order of the Court of Claims is considered, and it is GRANTED. We ORDER that the October 20, 2022 opinion and order of the Court of Claims, and any decision of the Court of Appeals in this matter, is stayed pending the appeal period for the filing of an application for leave to appeal in this Court, and if an application for leave to appeal is filed from the Court of Appeals decision, until further order of this Court. This order disposes of the defendants' application for leave to appeal.

BERNSTEIN, J. (*concurring*). I agree with the majority's decision to grant a stay in these consolidated cases. I write to explain why.

Justice VIVIANO appears to believe that granting a stay in this case is "a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek." The assumption that we are being driven by a results-oriented agenda is a confusing one at best, given that there are clearly significant legal issues at play here that merit this Court's full attention, which is unfortunately not feasible in the time left before election day. Justice VIVIANO notes that granting a stay here is inappropriate, referring to MCR 7.209(A)(2), but that court rule only speaks in terms of motions to stay filed in the Court of Appeals, where defendants filed a motion to waive the requirements of MCR 7.209. Although they did not file such a motion in this Court, there is nothing in MCR 7.209 to suggest that this requirement extends to this Court.[1] Justice VIVIANO even acknowledges that "our rules do not expressly address the standard applicable to these stays," but in the

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Data <https://www.michigan.gov/sos/elections/election-results-and-data> (accessed November 3, 2022) [https://perma.cc/M648-PPQK].

[1] Although MCR 7.305(I) states that "MCR 7.209 applies to appeals in the Supreme Court," given that MCR 7.209(A)(2) only speaks in terms of the Court of Appeals, it is unclear what the effect of MCR 7.305(I) is as to that provision. More importantly, MCR 7.209(F) refers to both the

same breath chastises the majority for not identifying a standard that he admits does not exist and that his dissenting colleague similarly does not apply.

In the interests of full transparency, assuming that the standard Justice VIVIANO has articulated is applicable here, I will briefly explain why I believe that a stay is appropriate under these circumstances. Justice VIVIANO notes that there is a four-part test that asks:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken v Holder*, 556 US 418, 434 (2009), quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

First, I believe defendants have made a strong showing that the doctrine of laches could apply to bar the relief that plaintiffs seek. The doctrine is an equitable one, and it may remedy "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (quotation marks and citation omitted). "It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id*., citing *Lothian v Detroit*, 414 Mich 160, 168 (1982); *McGregor v Carney*, 271 Mich 278, 280 (1935); and 11A Callaghan's Michigan Pleading & Practice (2d ed), § 92.12, p 580. In other words, "[t]he doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation." *Mich Ed Emp Mut Ins Co v Morris*, 460 Mich 180, 200 (1999).

The Court of Claims granted injunctive relief as to five of the plaintiffs' challenges to provisions of the election guidance published by the Bureau of Elections.[2] The majority of the challenged provisions at issue were first published in May 2022. Notably, the Court of Claims

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Court of Appeals and the Supreme Court, thus suggesting that the reference to the Court of Appeals alone in MCR 7.209(A)(2) is meaningful.

[2] Briefly, the first challenged provision standardizes the form that election challengers must use to be credentialed, whereas political parties formerly used custom forms for their own challengers; the second challenged provision states that challengers may be appointed up to the day before election day, but not on election day itself; the third challenged provision states that challengers may only communicate with a particular election inspector, designated as the challenger liaison, with repeat violations leading to the potential ejection of a challenger; the fourth challenged provision restricts the possession of electronic devices only in absent voter ballot processing facilities while

opinion pointed out that an earlier version of at least one of the challenged provisions was published in October 2020, and "there is nothing in the record to suggest that the manual was challenged in court on these grounds." In the consolidated cases before us, one set of plaintiffs first filed suit in the Court of Claims on September 28, 2022, while the other set of plaintiffs first filed suit in the same court on September 30, 2022. The Court of Claims did not enter its opinion and order until October 20, 2022.

It is clear that some delay took place in both cases, particularly with respect to the challenged provision that existed in a similar form as early as October 2020. The Court of Claims faults the Bureau of Elections for failing to "highlight or redline" the new provisions for the benefit of potential challengers, and it notes that one set of plaintiffs communicated its disagreements with these provisions in July 2022, concluding that "plaintiffs did not simply sit on their hands for four months, as defendants argue." But the doctrine of laches does not ask whether a plaintiff makes just any move in attempting to address the complained-of situation—it specifically asks whether there has been an unreasonable delay in *commencing a legal action*. See *Pub Health Dep't*, 452 Mich at 507.

I also believe that defendants have made a strong showing that this delay would result in prejudice. Defendants note that the guidance is binding on local clerks, and that training based on this guidance for both local clerks and election inspectors has already taken place across the state. It is impractical to think that new training could both be developed and take place the week before the election without a significant use of state resources, even if we assume this is a logistically achievable task within the time frame before us. Although both of my dissenting colleagues deny that any significant changes would be necessary at this point, it seems obvious that they would be—the August 2022 primary election was held with the challenged provisions in place, and a change would need to be made less than a week before the November 2022 general election. To say this would not be disruptive is to ignore reality and basic human behavior.

Accordingly, I believe that defendants have made a strong showing that they are likely to succeed on the merits of their laches defense.

Second, given that the doctrine of laches already incorporates a prejudice requirement, like Justice VIVIANO, I find that this factor follows the first.

The third and fourth factors concern whether there will be substantial injury to other interested parties and where the public interest lies.

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absent voter ballots are being processed with violations subject to ejection (as opposed to polling places, where electronic devices may be possessed subject to certain limitations); and the fifth challenged provision states that impermissible election challenges, defined for example as challenges that are made with respect to something other than a voter's eligibility or challenges that are made on the basis of a prohibited reason, need not be recorded in the poll book.

I begin by noting that defendants have submitted affidavits from current and former elections officials that explain why the challenged provisions are necessary to prevent the intimidation of both voters and election inspectors alike. I believe it more appropriate to defer both to the collective experience of these seasoned professionals and to the legal record that has been developed in this case, instead of inserting my own personal notions of what is efficient or not. Although Justice VIVIANO concludes that the public interest lies in striking the challenged provisions, it is especially noteworthy that these provisions applied to the August 2022 primary election, and yet there are no claims before us of any sort of havoc or catastrophe that resulted from the use of this guidance in that election.

I would thus find that defendants have met the standard articulated by Justice VIVIANO for a stay.

Moreover, it is important to bear in mind that the relief the Court of Claims granted in these cases was injunctive relief, which "is an *extraordinary* remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9 (2008) (quotation marks and citations omitted; emphasis added). I find it hard to believe that plaintiffs could establish a real and imminent danger of irreparable injury, again in light of the unchallenged administration of the August 2022 primary election. One set of plaintiffs in these cases includes the Michigan Republican Party and the Republican National Committee. I find it puzzling how these plaintiffs could establish a real danger of irreparable injury, given that the challenged provisions apply equally to all would-be election challengers, be they Republican, Democratic, or otherwise.

Given the strong arguments that defendants have made in favor of the application of the doctrine of laches, and given the high standards applicable where plaintiffs request injunctive relief, I vote with the majority to grant a stay in this case. I continue to be confused by the insinuation that "the stakes of this case . . . could not be higher." Of course I believe in the importance of elections in our representative democracy, a statement that I have repeated across a number of election cases over the eight years I have served on this Court. But it remains the case that the August 2022 primary election was conducted without any problems or objections. If August 2nd went smoothly, I have no reason to believe November 8th will be any different.

WELCH, J. (*concurring*). I agree with the Court's decision to stay the legal effect of the Court of Claims' October 20, 2022 opinion and order. I write separately to explain why I believe a stay is appropriate. At issue in this case are several modifications made by the Bureau of Elections to its election manual in May 2022. With respect to the changes in the manual, the parties have competing arguments about the interaction of the Michigan Election Law (MEL), MCL 168.1 *et seq*., and the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Thoughtful consideration and conclusive resolution by the judiciary are warranted on these important issues. But timing matters, especially when a lawsuit contests election procedures and seeks emergency relief just days before

an election. See *Purcell v Gonzalez*, 549 US 1, 5-6 (2006); *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016); *New Democratic Coalition v Secretary of State*, 41 Mich App 343, 356-357 (1972).

Specifically, plaintiffs in these two cases raise challenges to an election manual relating to election challengers and poll watchers, which was published by the Michigan Bureau of Elections on May 25, 2022, and announced through a digital news bulletin on the Secretary of State's website on the same date.[1] It appears to be undisputed that either staff or attorneys of plaintiffs Michigan Republican Party and Republican National Committee have been aware of the 2022 manual since it was issued or shortly thereafter, regardless of when the those parties claim to have realized that the 2022 manual was not identical to the 2020 manual. The record also shows that plaintiff Philip O'Halloran was personally aware of the new provisions in the manual as early as July 2022, as evidenced by e-mails sent by O'Halloran to the Secretary of State raising some of the exact concerns that have been pleaded in these cases. The 2022 manual was in place and relied on by local clerks, election workers, poll watchers, and challengers for the August 4, 2022 primary election. It further appears that plaintiffs O'Halloran, Braden Giacobazzi, Robert Cushman, and Richard DeVisser served as election challengers for the August primary election.

Despite the availability of the 2022 manual since May 2022 and several of the plaintiffs' subjective knowledge of the manual and its contents, the lawsuits in this matter were not filed in the Court of Claims until September 28, 2022, and September 30, 2022. Both groups of plaintiffs claim that aspects of the 2022 manual conflict with the MEL, exceed the legal authority held by defendants to issue election instructions and guidance without first going through formal notice-and-comment rulemaking under the APA, and infringe the statutory rights of designated election challengers under MCL 168.730. Defendants, in response, point both to the statutory authority provided by the MEL and the historic practices of the office of the Secretary of State and the Bureau of Elections. After the Court of Claims largely ruled in favor of plaintiffs on October 20, 2022, defendants immediately requested that the Court of Appeals grant expedited relief or a stay of the Court of Claims' decision no later than October 26, 2022 and requested waiver of the requirement under MCR 7.209(A)(2) that a motion for a stay pending appeal must first be filed in the applicable trial court. The Court of Appeals has yet to issue an order. Accordingly, defendants filed a bypass application in this Court on October 28, 2022, asking the Court to enter a stay of the Court of Claims' decision.[2] The requested stay would ensure that local election workers can rely on the 2022 manual in

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[1] The 2022 manual that is at issue is titled: "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers."

[2] To be clear, the Court of Appeals has yet to rule on the merits of the parties' arguments, and the stay that this Court is putting in place merely prevents the Court of Claims' decision from being enforced immediately. Defendants have not asked this Court to resolve the merits

the November 2022 general election while the courts work through the complex and jurisprudentially significant legal issues presented in these cases.[3]

All parties agree that " '[a] State indisputably has a compelling interest in preserving the integrity of its election process,' " *Purcell*, 549 US at 4 (citation omitted), but they disagree about whether certain provisions of the 2022 manual hinder or help this compelling interest. The United States Supreme Court has long recognized that courts should be cautious in granting injunctive or declaratory relief that will

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of this dispute at this time. Nor does any Michigan precedent or court rule require an evaluation of the merits of an appeal when deciding whether to grant or deny a stay pending appeal. Regardless of whether this Court should adopt a new general standard for when a stay pending appeal should be granted, we certainly should not adopt such a standard for the first time when an appeal is before the Court in an emergency posture. Thus, rather than engage in a merits analysis on matters that are likely to be reviewed by this Court in the future, I believe it most appropriate to look to relevant state and federal precedent concerning delayed legal challenges that relate to election matters. That authority weighs strongly in favor of the Court's decision to grant a stay.

[3] I agree with Justice BERNSTEIN that the procedural posture of this case does not preclude ordering a stay. Defendants' bypass application sought a ruling on their motion to grant a stay and to waive the procedural requirements contained in MCR 7.209(A) that is still undecided and pending before the Court of Appeals. This Court has the authority to entertain such a request both under its general powers and pursuant to MCR 7.303(B)(1), MCR 7.305(C), and MCR 7.316(A)(7). In fact, while this Court denied a bypass application and a request for a stay in *AFT Mich v Michigan*, 493 Mich 884 (2012), it granted the request to waive the procedural requirement under MCR 7.209(A)(2) and (3), as well as the requirements under MCR 7.302(I) (which has since been renumbered as MCR 7.305(I)). *AFT Mich* was before this Court in a different procedural posture given that a separate motion for a stay was filed along with the bypass application, but no motion for a stay had been filed in or denied by the lower courts. We also granted a motion to waive MCR 7.209(A) in *Bailey v Pornpichit*, 722 NW2d 221 (Mich, 2006). And, since the *AFT Mich* order was entered, this Court has denied at least two other requests to waive the procedural requirements of MCR 7.209(A) without suggesting that it lacked the authority to grant such a request. See *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 502 Mich 881 (2018); *Doe v Dep't of Corrections*, 497 Mich 882 (2014). This is not the first time this Court has entertained or granted requests to waive procedural requirements governing requests for a stay, and while granting such requests should be rare, the timing and nature of this election-related matter warrants granting defendants' request.

alter election rules or procedures when an election is imminent, there is a need for clear guidance, and there is inadequate time to resolve complex factual or legal disputes relating to important election matters. See *id*. at 5-6. This is especially true where a plaintiff has unreasonably delayed bringing a claim before the court. See, e.g., *Crookston*, 841 F3d at 398 ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."). This is, in essence, the equitable doctrine of laches applied in a unique way to election matters. See *New Democratic Coalition*, 41 Mich App at 356-357 ("We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections."); *Nykoriak v Napoleon*, 334 Mich App 370, 383 (2020) ("The circuit court did not err by finding unexcused or unexplained delay, particularly in light of plaintiff's prior experience with elections").[4]

As the Sixth Circuit noted in *Crookston*, 841 F3d at 398, whether it be "laches, the *Purcell* principle, or common sense," there are compelling reasons not to disrupt established election processes and procedures on the eve of an election "absent a powerful reason for doing so." No adequate justification exists in these cases. The 2022 manual has been publicly available since May 25, 2022. Since its release, the 2022 manual has been relied on for both training purposes and administration of the August primary election. At least one plaintiff had personal knowledge of the changes implemented by the 2022 manual prior to the August primary, and several plaintiffs served as election challengers for the August primary under the terms provided by the manual. But the lawsuits at issue were not filed until the end of September. Additionally, the November 2022 general election was less than three weeks away when the Court of Claims entered its opinion and order. The general election is now less than one week away. Training for poll workers has been completed. It would be impossible to retrain thousands of workers across our state within a matter of days.

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[4] See also *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (holding that laches "is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party"); 4 Restatement Torts, 2d, § 939, comment *a*, p 576 ("Even during a period less than that prescribed by an applicable or analogous statute of limitations, delay by the plaintiff in bringing suit, after he knew or should have known of the tort may result in relief being denied, wholly or in part, if the delay has operated to the prejudice of the defendant or has weakened the court's facility of administration."); *id*. at § 939, comment *b*, p 577 ("The reasonableness of the delay is tested by asking what should have been expected of one in the plaintiff's position as the menace to his interests from the defendant's conduct developed.").

The parties raise compelling legal arguments, and the scope of defendants' power to administer election processes and procedures are jurisprudentially significant. While the parties and the electorate of Michigan deserve definitive answers, I believe the stay in this case will avoid confusion on election day and still allow for the merits of the claims in plaintiffs' lawsuits to proceed through the courts for resolution.

ZAHRA, J. (*dissenting*). I dissent from the majority's decision to grant a stay.

Defendants[1] filed a motion to bypass[2] the Court of Appeals' jurisdiction[3] asking this Court to overturn the Court of Claims' decision granting DeVisser limited relief in this election case. The underlying matter concerns defendants' May 25, 2022 release and implementation of a publication entitled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (the Manual). Plaintiffs filed lawsuits in the Court of Claims on September 28 and 29, 2022, arguing that the Manual included "rules" that ought to have been promulgated by the Administrative Procedures Act (APA), MCL 24.201 *et seq*. On October 3, 2022, the court consolidated the cases and directed defendants to show cause why relief should not be granted and to file any motions for summary disposition by October 11, 2022. On October 20, 2022, the court issued a 29-page opinion that largely granted the relief sought by the DeVisser plaintiffs and denied the O'Halloran plaintiffs the broader relief sought in that case.[4] The court ruled that defendants were required to promulgate rules under the APA in regard to the Manual's requirements that: (1) poll watchers use a uniform credential form supplied by the Secretary of State, (2) poll watchers must be appointed or credentialed no later than the day before election day, (3) poll watchers may only communicate with an appointed "challenger liaison," as opposed to communicating with any election inspector, (4) poll watchers are prohibited from possessing electronic devices in absent voter counting board facilities, and (5) so-called "impermissible challenges" to a person's eligibility to vote not be recorded in the poll book. The Court of Claims also rejected defendants' laches defense, concluding that plaintiffs acted with reasonable diligence and that defendants failed to demonstrate prejudice.

The Court of Claims provided defendants some discretion in how to proceed:

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[1] I refer to defendant Secretary of State and defendant Director of the Bureau of Elections collectively as "defendants" and specify the Secretary of State when referring to that party in the singular.

[2] See MCR 7.303(B)(1) and 7.305(C)(1).

[3] Defendants' claim of appeal and motion to stay the Court of Claims' decision remain pending in the Court of Appeals.

[4] In this procedural posture, the additional relief sought by DeVisser and O'Halloran that the Court of Claims denied is not at issue.

> Under MCR 2.116(I) and MCR 2.605, the Court concludes that the DeVisser Plaintiffs' claims set forth in Paragraph 30 of their complaint are well-founded in fact and law, and, as a result, the Court declares that defendants have violated the Michigan Election Law and the APA, as explained in this Opinion and Order. The May 2022 Manual, in and of itself, does not have the force and effect of law and defendants are enjoined from using or otherwise implementing the current version of the May 2022 Manual to the extent that such enforcement, use, or implementation would be inconsistent with this Opinion and Order.

Defendants appealed and filed a motion to stay the Court of Claims' judgment, but the Court of Appeals has not yet taken action. Defendants now seek relief from this Court through a bypass application.

Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."[5] A "rule" not promulgated in accordance with the APA's procedures is invalid.[6] An agency must use formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program."[7] "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed."[8] It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA.[9]

This is not the first time that the Secretary of State has claimed to merely be issuing "instructions" to justify the lack of open and transparent promulgation of rules under the APA. The same claim was made before the 2020 general election. Yet, in March 2021, the Court of Claims issued an opinion that held, "[i]n sum, the standards issued by defendant [Secretary of State] on October 6, 2020, with respect to signature-matching requirements amounted to a 'rule' that should have been promulgated in accordance with the APA. And absent compliance with

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[5] MCL 24.207.

[6] MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205 (1982).

[7] *Faircloth v Family Independence Agency*, 232 Mich App 391, 404 (1998).

[8] *American Federation of State, Co, & Muni Employees v Dep't of Mental Health*, 452 Mich 1, 10 (1996) (*AFSCME*).

[9] *In re Pub Serv Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263 (2002).

the APA, the 'rule' is invalid."[10] In the present case, the Court of Claims carefully and reasonably reviewed the challenges and found each to be in conflict with statutory law concerning the credentialling of poll watchers and their conduct during the election. At this stage of these proceedings, I cannot conclude that a stay of the Court of Claims judgment should enter. Indeed, it appears likely that defendants have once again chosen to implement "rules" under the guise of "instruction."

Under MCL 168.31(1)(a), the Secretary of State shall "issue instructions and promulgate rules pursuant to the [APA] for the conduct of elections and registrations in accordance with the laws of this state." Defendants undisputedly did not promulgate revisions to the Manual pursuant to the APA, and they argue that they were not required to do so because the revisions were only instructional. Yet, defendants assert that "the instructions are binding on local clerks, MCL 168.21, MCL 168.31(1)(a)-(c), who in turn have the obligation to train all election inspectors on Election Day procedures pursuant to those instructions, including the procedures related to challengers and the challenge process, MCL 168.31(1)(c), (i), (m)." Defendants cannot have it both ways. While defendants maintain that the Manual was revised to provide mere instructions, those instructions became manifest when actually implemented and put into practice during the August 2, 2022 primary. At that point, plaintiffs could cite the revisions to the Manual and claim the revisions were not merely instructional, they were in fact rules that were required to be promulgated under the APA to have the effect of law.[11]

Further, because the rules were first implemented during the August 2, 2022 primary, I am hard-pressed to conclude that a lawsuit filed eight weeks after the primary and six weeks before the general election shows an unexcused or unexplained delay in commencing an action. Nor am I convinced that defendants have shown prejudice because of an allegedly late filing.[12] Surely, the Secretary of State was aware that these proposed instructions might later be challenged as rules that must

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[10] *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), p 14.

[11] See *AFSCME*, 452 Mich at 12 (recognizing that the Department of Mental Health did not need to take a certain action; however, once the department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule").

[12] There is a statutory rebuttable presumption of laches in cases brought within four weeks of an election. MCL 691.1031. Plaintiffs avoided this presumption by filing their claims six weeks prior to the general election. Election litigation will always be expedited. But I have consistently maintained that six weeks is a sufficient amount of time to consider matters that will affect an election, such as the collection and tabulation of ballots. See *Johnson v Bd of State Canvassers*, 509 Mich 1015, 1016 (2022) (ZAHRA, J., concurring).

be promulgated under the APA. As mentioned, a very similar challenge occurred during the Secretary of State's tenure, just a year before the Manual was revised.[13]

Obviously, the more prudent and transparent manner of revising the Manual is to simply promulgate the rules under the APA. For this reason, defendants do not arrive at this Court with clean hands to claim they are prejudiced by a judicial decision that they were entirely able to avoid. In fact, the majority's decision to grant a stay will only enable defendants to continue this practice. Further, I seriously question defendants' claim that significant retraining will be required without the stay. The Court of Claims' judgment is narrowly tailored to five concerns. These concerns relate to revisions of the Manual addressing practices that had been permitted in prior elections. Thus, seasoned poll workers will need only be informed that they should revert to their prior practices. In sum, officials need not require a uniform credential form, poll watchers may be credentialed the day of the election, poll watchers may communicate with any election inspector, poll watchers may possess electronic devices in absent voter counting board facilities, and challenges to a person's eligibility to vote must be recorded in the poll book. Given that this was the practice for a significant amount of time before the August 2, 2022 primary, following this directive hardly strikes me as something on which significant retraining is required, if any at all. For these reasons, I would deny the stay.

VIVIANO, J. (*dissenting*). We live in a political age where one side claims our "democracy is at stake" because the other is questioning the integrity of our elections—an age-old and seemingly bipartisan tradition. See Foley, *Ballot Battles: The History of Disputed Elections in the United States* (New York: Oxford University Press, 2016). Therefore, the stakes of this case—which will affect how this year's election is administered—could not be higher. But you would not know it from the majority's treatment of the case. The majority's order, which is barren of any legal analysis or discussion, stays the trial court's decision enjoining enforcement of changes made by defendant Secretary of State to the 2022 Election Manual (hereafter "Manual") to regulate the conduct of the upcoming election. In doing so, the majority disregards our court rules and the basic need to provide reasoned, principled decisions. And it has almost certainly ensured that the present election will not be governed by Michigan law as interpreted by the only court to rule on the merits of this election dispute.

Instead, under the general principles governing stays, I would reject defendants' motion for a stay, as I believe defendants have not shown sufficient likelihood of success on the merits or that they would be irreparably harmed by enforcement of the trial court's order.

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[13] See note 10 of this statement and accompanying text.

I. FACTS AND PROCEDURAL HISTORY

These cases start with the Election Manual itself, and the recent changes to it. Under MCL 168.31(1)(c), the Secretary of State must "[p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on . . . procedures and forms for processing challenges . . . ." The Secretary of State must also "develop instructions consistent with [the Michigan Election Law, MCL 168.1 *et seq*.] for the conduct of absent voter counting boards or combined absent voter counting boards." MCL 168.765a(13). Those instructions "are binding upon the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township." *Id*. In May 2022, the Secretary of State issued a substantially new version of the portion of the Election Manual pertaining to election challengers and poll watchers.[1]

The first major change related to the credentials for election challengers. The relevant statute provides that the challenger must have an "[a]uthority signed by the recognized chairman or presiding officer" of a political party or certain other groups—and that this authority "shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept . . . ." MCL 168.732. Past election manuals have not required anything more than what is required by this statute. But in the present Manual, the Secretary of State has attempted to define the "authority" mentioned in the statute as a "Michigan Challengers Credential Card," which must appear "on a form promulgated by the Secretary of State."[2] "If the entire form is not

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[1] An electronic version of the Manual appears on the Secretary of State's website. The updated portion at issue here—titled *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*—seems to replace a portion of the Manual; however, the online version of the manual does not reflect this update and instead reports that the relevant section of the Manual was last updated in October 2020. Michigan Secretary of State, *Election Administrator Information* <https://www.michigan.gov/sos/elections/admin-info> (accessed November 2, 2022) [https://perma.cc/NXB6-UVV6] (see the boldface heading "Election Officials' Manual / Accreditation Study Guide" and under that heading the link to Chapter 11, which concerns "Election Day Issues," indicating that the linked material was last updated in October 2020). The updated portion at issue is not included with the Manual but is provided under a separate heading and is not identified as part of the Manual.

[2] Michigan Secretary of State, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p 4, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=96200bfb95184c9b91d5b1779d08cb1b&hash=2CE1F512E8D7E44AFAF60071DD8FD750> (accessed November 3, 2022) [https://perma.cc/GL8Z-GLSK].

completed," the Manual warns, "the credential is invalid and the individual presenting the form cannot serve as a challenger."[3]

The next changes deal with a new position created by the Secretary of State: the challenger liaison. Election challengers have statutory authority to "[b]ring to an election inspector's attention" various problems, such as improper ballot handling or violations of election law. MCL 168.733(1)(e). Past manuals have provided for election officials to supervise these challenges. The 2020 manual, for example, provided that certain challenges "must be directed to the chairperson of the precinct board . . . ."[4] The current Manual, by contrast, prohibits challengers from even speaking with anyone other than the liaison: "Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee," unless instructed otherwise.[5] Violation of this, or any other instructions, will lead to a warning, followed by possible ejection.

The third change is to the possession of electronic devices. No statute speaks to whether challengers can possess such devices. However, the Legislature has prohibited challengers from communicating information relating to the processing or tallying of votes until the polls close. MCL 168.765a(9). Past manuals have prohibited the use of electronic devices but never their mere possession. The present Manual, however, bans possession in absent voter ballot facilities while absent voter ballots are being processed.[6]

The final change is to recording challenges. By statute, registered electors of a precinct can "challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct." MCL 168.727(1). If such a challenge is made, the election inspector must "[m]ake a written report including" various information. MCL 168.727(2)(b). The statute further prohibits challenges made "indiscriminately and without good cause" and provides that a challenger who makes challenges "for the purpose of annoying or delaying voters is guilty of a misdemeanor." MCL 168.727(3). The 2022 Manual has created a new class of challenges, what it deems "impermissible challenges": those made on improper grounds, such as to something other than the voter's eligibility.[7] "Elec-

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[3] *Id*. at 4-5.

[4] Michigan Department of State, Bureau of Elections, *Election Officials' Manual* (October 2020), ch 11, p 32, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/XI_Election_Day_Issues.pdf?rev=dca6cfa2f9dd422a8444825a521324b8&hash=E80A0F3EDFF7F288B13ECA626E380237> (accessed November 2, 2022) [https://perma.cc/F3RB-9ME5].

[5] *Appointment, Rights, and Duties* (May 2022), p 6 (boldface omitted).

[6] *Appointment, Rights, and Duties* (May 2022), p 9.

[7] The 2003 manual distinguished between "proper" and "improper" challenges but did not purport to absolve election inspectors of their duty to record the challenge or threaten challengers with expulsion for

tion inspectors are not required to record an impermissible challenge in the poll book," according to the Manual.[8]

Plaintiffs sued, seeking to enjoin these aspects of the Manual, among other requested relief. The Court of Claims agreed. It noted, at the outset, that the Secretary of State's instructions were not promulgated as rules under the Administrative Procedures Act, MCL 24.201 *et seq*. Therefore, as defendants acknowledged, they did not have the force and effect of law. With regard to the Secretary of State's credential form, the court explained that "our Legislature expressly set out the 'evidence' needed to show that a person was properly credentialed as a challenger" in MCL 168.732. The Secretary of State could not add to the requirements by mandating the use of a particular form.

With regard to the challenger liaison, the Court of Claims stated that "[t]he authority to designate a 'challenger liaison' is absent from the Michigan Election Law—in fact, the very label appears nowhere in the statute." No sources were cited, the court observed, to support this restriction of the challengers' statutory "right to communicate to 'an' election inspector . . . ." Therefore, the restriction was inappropriate. Next, in relation to electronic devices in the absent voter counting board facilities, the court again noted the lack of statutory authority supporting the change. The Legislature restricted communications made by challengers regarding the processing of absentee ballots, but it did not prohibit possession of electronic devices, even though it would have been very easy to do so. "Prohibiting electronic devices in the [absent voter counting board] facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule." Therefore, the restriction was impermissible.

Finally, the court enjoined enforcement of the "impermissible" challenges provision. The court noted that nothing in MCL 168.727(2) gave election inspectors discretion to decline to record a challenge made to the voting rights of a person. This contrasted with other types of challenges and actions that election challengers were entitled to make, such as many of those under MCL 168.733.[9] Nor did defendants cite any authority for the proposition that a challenger could be ejected for

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making these challenges. The 2003 manual did, however, allow the precinct chairperson to expel challengers who "abuse[d] the challenge process." This provision does not appear to have been continued in subsequent manuals.

[8] *Appointment, Rights, and Duties* (May 2022), p 10 (boldface omitted).

[9] For example, MCL 168.733(1)(d) provides challengers the right to "[c]hallenge an election procedure that is not being properly performed." MCL 168.733(1)(c), by contrast, involves challenges to voting rights under MCL 168.727, which do require reports.

making impermissible challenges. Consequently, the Manual veered from the statutes and could not be enforced.[10]

The court also rejected defendants' laches argument, i.e., that plaintiffs unduly delayed suit to the prejudice of defendants. It explained that the plaintiffs "did not simply sit on their hands for four months" after the Manual was issued in May 2022. Further, the court found no evidence that defendants would be prejudiced by any delay in bringing the case. The Manual is almost entirely instructive, rather than enforceable, the court observed, and could be easily tweaked on the few points where it went astray.

Defendants then appealed in the Court of Appeals, filing a motion to stay the Court of Claims judgment. The Court of Appeals has not yet ruled. Defendants now seek to bypass the intermediate appellate stage and come straight to this Court. They ask that this Court grant the bypass application and stay enforcement of the Court of Claims judgment.

II. PROCEDURES AND STANDARDS FOR A STAY

A. MCR 7.209

The majority has found a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek. Instead of addressing the merits of this election-emergency case prior to the election, or doing anything that ensures the merits will be addressed on appeal by then, the majority simply stays all lower court decisions in this case until after the Court of Appeals issues a decision and after we have subsequently disposed of the case. With less than one week to go before the election, there is little prospect of the case being finally resolved before election day. The election will likely come and go with the Secretary of State's challenged Manual firmly in place, even though the only court to rule on the merits found it contained new provisions that exceeded the Secretary of State's authority.

The majority tramples over the court rules allowing us to order a stay. MCR 7.209, which addresses stays for cases on appeal in the Court of Appeals, applies to appeals in this Court. See MCR 7.305(I). Under MCR 7.209, a party can seek in the Court of Appeals to stay the effect or enforceability of a trial court's judgment *if* a stay bond or motion for a stay pending appeal was decided by the trial court. MCR 7.209(A)(2) ("A

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[10] Plaintiffs also challenged language in the Manual providing that "[p]olitical parties eligible to appear on the ballot may appoint or credential challengers at any time *until* Election Day." Defendants acknowledged, however, that MCL 168.730 and MCL 168.731 permit appointment through election day itself. The Court of Claims required defendants to make this amendment to the Manual. Because defendants conceded this issue, and because the Court of Claims' decision appears plainly correct, I will not address it below.

motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court."). The Court of Appeals "may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just." MCR 7.209(D).

In the present case, it does not appear that defendants ever moved for a stay in the trial court (here, the Court of Claims), and the trial court never decided the issue. Thus, under MCR 7.209(A)(2), defendants were prohibited from even filing a motion for a stay in the Court of Appeals. Yet they did just that, along with a request to waive the requirements in MCR 7.209(A)(2). But nothing in MCR 7.209 suggests that courts have the power to waive this threshold requirement. Nor does the majority's order suggest that it is granting the waiver or provide any reasons for doing so. And in seeking a bypass application here, defendants only sought entry of a stay—they did not even seek a waiver of MCR 7.209(A)(2)'s requirements. Thus, even if courts can absolve parties of legal requirements that the parties admit noncompliance with, it does not appear that this stay motion is properly before this Court.

B. STANDARDS FOR ENTERING A STAY

More amazing still, the majority accomplishes its result, in an important case affecting the statewide rules governing the upcoming election, without any pretense that it must justify the stay by giving reasons based in law. This is in tension with the constitutional requirement that our "[d]ecisions . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ." Const 1963, art 6, § 6. Often, this constitutional provision does not require much. Many of our cases are decided or resolved in short orders. But more is called for here, at the very least as a prudential matter. In a case of this magnitude, when the Court is halting a decision by a lower court—the only court to have considered the merits thus far—in a manner that will affect the conduct of the election and almost certainly will deprive plaintiffs of relief in this election, I believe the Court should provide at least some legal rationale for its decision.

Compounding this problem is the lack of any clear standard being applied by the majority in cases involving stays of lower court orders. To be sure, our rules do not expressly address the standard applicable to these stays. MCR 7.209(D)—which is applicable to this Court under MCR 7.305(I)—allows an appellate court to stay enforcement of trial court judgments on "terms it deems just." And neither has this Court established a standard, having ordered stays in the past without any rationale—a practice I have occasionally dissented from. *Sheffield v Detroit City Clerk*, 507 Mich 956, 957 (2021) (VIVIANO, J., concurring in part and dissenting in part).

Without any standard whatsoever, these stays are essentially arbitrary, as far as the parties and public are concerned. It might be that the majority favors the arguments of one side or the other, or prefers a particular political outcome, or enters a stay because it is Tuesday. This

lack of any discernable standard being applied by the Court in these cases conflicts with the nature of judicial decisionmaking. Principled judicial decisionmaking requires a reasoned application of general principles and laws applicable to the present case and like cases. Cf. Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993), pp 3-4. If a judge cannot discover such principles that yield his or her desired result, it usually means those principles do not exist. *Id*. To give no basis for a decision means that the judges might have acted for *any* reason, good or bad, principled or unprincipled. As the United States Supreme Court has explained, an appellate court's ability to hold a lower court order in abeyance pending an appeal is an inherent power within the discretion of the court—but this " 'does not mean that no legal standard governs that discretion. . . . "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." ' " *Nken v Holder*, 556 US 418, 434 (2009), quoting *Martin v Franklin Capital Corp*, 546 US 132, 139 (2005) (citation omitted; alterations in original).

The majority identifies no standard and provides no reasoning for its decision to stay this case. Nor could I identify any "sound legal principles" supporting its conclusion. In this regard, it has been observed that the nature of the question whether to enter a stay in these circumstances is equitable. See *Daly v San Bernardino Co Bd of Supervisors*, 11 Cal 5th 1030, 1054 (2021) (noting "the essentially equitable nature of the stay pending appeal" and observing that many courts apply equitable considerations). The United States Supreme Court has articulated the widely followed test for stays pending appeal:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken*, 556 US at 434, quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

Many, if not most, other courts follow this standard or something like it.[11] In the present case, moreover, defendants have analyzed their

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[11] See Or Rev Stat 19.350(3) (enacting four factors similar to the federal standards); Nev R App P 8(c) (same); *Ex parte Krukenberg*, 252 So 3d 676, 678 n 1 (Ala Civ App, 2017) (using federal-standard factors); *Smith v Arizona Citizens Clean Elections Comm*, 212 Ariz 407, 410 (2006) (same); *Romero v City of Fountain*, 307 P3d 120, 122 (Colo App, 2011) (adopting federal standards); *State v Gudenschwager*, 191 Wis 2d 431, 440 (1995) (using the federal standards); *Reading Anthracite Co v Rich*, 525 Pa 118, 125 (1990) (applying the federal standards); *Purser v Rahm*, 104 Wash 2d 159, 177 (1985) (applying a different test that similarly examines the "equities of the situation"); see generally 4 CJS, Appeal and Error, § 530 (Oct 2022 update) ("A party requesting a stay

request for a stay under these same basic factors. I believe this four-part standard applies to stays sought under MCR 7.209 and, unlike the majority, would apply it in the present matter.[12]

III. APPLICATION

A. LIKELIHOOD OF SUCCESS ON THE MERITS

The first question is whether defendants have shown a likelihood of success on the merits. There are two parts to this question. First, have defendants demonstrated that the trial court erred in its analysis of the statutory provisions and the Secretary of State's violations of them? Second, even if not, have defendants demonstrated a likelihood of success on the merits of their laches defense? For the reasons that follow, I find that this factor weighs against the stay.

1. STATUTORY VIOLATIONS

On the statutory issues, the trial court thoroughly assessed each argument, and I agree with its analysis. The trial court's analysis of the credential-form issue accurately determined that this new provision added requirements beyond what the statutes provided. In this Court, defendants contend that MCL 168.732 does not explicitly allow individual groups to use their own challenger cards, whereas MCL 168.31(1) gives the Secretary of State authority to create a manual "that includes procedures and forms for processing challenges." Defendants' argument ignores MCL 168.731(1), which allows the opportunity for certain other groups—"incorporated organization[s] or organized committee[s] of interested citizens other than political party committees authorized by this act"—to seek appointment of challengers. In applying to appoint challengers, the group must submit, among other things, "a facsimile of the card to be used" by the challenger. *Id*.

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pending appeal must show a likelihood of prevailing on the merits, irreparable injury in the absence of the stay, and that a stay will not substantially harm other interested parties nor harm the public interest.").

[12] Another very concerning aspect of the majority's order is its highly unusual end-to-end scope of coverage. In a normal case, this Court might stay a trial court decision pending a decision by the Court of Appeals. Here, by contrast, this Court has ensured that the Court of Appeals will not be able to interfere even if it carefully considers the matter and issues an opinion founded on solid legal grounds. Blunting the impact of any action by the Court of Appeals sight-unseen, without this Court providing any legal basis for doing so, appears to be unprecedented.

The Secretary of State's credential-form requirement applies to all challengers, not just challengers appointed by political parties. That clearly contradicts MCL 168.731(1). And it would make little sense for the nonpolitical-party challengers to use their own cards whereas political-party challengers cannot. Any distinction between MCL 168.731 and MCL 168.732 is not an invitation to the Secretary of State to use her authority under MCL 168.31(1) to add new requirements onto political-party challengers. Although she has the obligation to furnish a manual providing forms, nowhere does she have authority to make the use of those forms mandatory such that, even if a challenger satisfies all other statutory requirements, the challenger can be removed for failure to use the Secretary of State's preferred form. Indeed, as she admits, the Manual lacks the force of law—so how can it require outcomes different from those mandated by statute?

The challenger-liaison requirement has even less support. As the trial court observed, the statute allows challengers to bring their challenges to "an election inspector[]." MCL 168.733(1)(e). Defendants argue that "an election inspector" does not mean "*any* election inspector." That may be true, but the Manual goes well beyond that. As noted above, past manuals have channeled certain challenges to certain officials. Requiring that a challenge ultimately be handled by a certain individual is arguably consistent with the statutory language and defendants' observation. But the Secretary of State's rule precludes all communication between challengers and inspectors other than the liaison. It imposes a restriction on challengers that is nowhere found in the statutes and that can lead to the challengers' ejection. The Secretary of State's power under MCL 168.31(1)(c) to issue nonbinding procedures for challenges cannot encompass the power to create extrastatutory rules that result in the expulsion of otherwise legally present challengers.

The prohibition on electronic devices likewise impermissibly adds to the statutory requirements. As the trial court noted, the Legislature carefully calibrated the prohibitions in this area, prohibiting communications about the absent-ballot processing but nowhere prohibiting electronic devices. Defendants' argument in this Court boils down to the proposition that to effectuate the prohibition on outside communications—a prohibition that was first enacted in 1965 PA 331—the Secretary of State must now prohibit electronic devices. If that is so, it is a policy choice for the Legislature to make and not for the Secretary of State to decree.[13]

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[13] This is not the first time a party has claimed that the Secretary of State has exceeded her limited powers as an executive branch official. See, e.g., *Davis v Secretary of State*, 506 Mich 1022 (2020) (challenging the Secretary of State's last-minute directive banning the open carrying of firearms at polling places on election day); *Davis v Secretary of State*, 506 Mich 1040, 1040 (2020) (VIVIANO, J., dissenting) (challenging the Secretary of State's unsolicited mass mailing of absentee ballot applications); *Genetski v Benson*, unpublished opinion and order of the Court

Finally, I agree with the trial court's analysis of the impermissible challenges. MCL 168.727(1) provides that any registered elector can challenge an individual's right to vote "if the elector knows or has good reason to suspect that individual is not" a registered voter. If such a challenge is made, the election inspector "shall" record it. MCL 168.727(2). Nothing in the statute purports to give election inspectors the discretion to determine sua sponte whether a challenge is permissible or not. This gives the inspector the power to eliminate any record of the challenge, and therefore any opportunity to review this determination in the future. The Secretary of State has erected categories of challenges with discrete requirements that find no support from the statutes.[14] And, yet again, the Secretary of State has added a basis for expulsion of challengers.

For these reasons, and those given by the trial court, I conclude that defendants have little chance of success on the merits of their statutory arguments.

2. LACHES

Defendants also contend that plaintiffs' entire cases are barred by laches. The trial court's application of the legal doctrine is reviewed de novo, but any findings of fact supporting its decision are reviewed for clear error. *Shelby Charter Twp v Papesh*, 267 Mich App 92, 108 (2005). Defendants do not explain why the trial court's factual determinations regarding the ease of rectifying the Manual are clearly erroneous.

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of Claims, issued March 9, 2021 (Docket No. 20-000216-MM) (determining that the Secretary of State's instructions regarding signature-matching requirements constituted a rule that should have been promulgated under the Administrative Procedures Act).

[14] At best, defendants might claim that the recording requirement is contingent on a challenge being made pursuant to MCL 168.727(1), and that a challenge made pursuant to that subsection must be one in which the challenger knows or has good reason to suspect the voter is ineligible to vote. In other words, the recording requirement is inapplicable if the challenger lacks knowledge of or good reason to suspect the voter's ineligibility. Such an interpretation, however, would seem to stretch the text beyond its limits. How is the inspector to discern, upfront, whether the challenger knows or has good reason to suspect ineligibility? The inspector could not determine this unless he or she prejudged the challenge. And again, there is nothing in the statute suggesting that inspectors wield this level of discretion. In any event, the Secretary of State has not attempted to justify her Manual on this interpretation, nor could she: the Manual's categories of impermissible challenges and various subcategories of challenges is far too detailed to find any support in the statute.

More importantly, I agree with the trial court's conclusion that laches does not apply. Laches is an equitable doctrine that applies to prevent a party from proceeding to seek enforcement of a legal right. *Nykoriak v Napoleon*, 334 Mich App 370, 382-383 (2020). Laches applies when the party has failed to take timely action *and* the opposing party can demonstrate that it was prejudiced as a result. *Id*. at 382. This Court has emphasized, time and again, that delay alone is not enough —prejudice is essential. As we reiterated in *Kaiser v Kaiser*, 213 Mich 660, 661 (1921):

> "[M]ere lapse of time does not necessarily constitute laches. As a rule it involves other considerations. It means that negligence or omission to assert a right which, considering the lapse of time in connection with other facts and circumstances prejudicial to the interests of the adverse party, render it unjust and inequitable to recognize such right when finally asserted. * * * Where the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot as a rule be recognized." [Quoting *Walker v Schultz*, 175 Mich 280, 293 (1913).]

See also *Dunn v Minnema*, 323 Mich 687, 696 (1949) ("This Court has repeatedly held that mere delay in attempting to enforce a right does not constitute laches, but that it must further appear that the delay resulted in prejudice to the party claiming laches of such character as to render it inequitable to enforce the right."). Other courts have emphasized that "the prejudice must be *material* before laches will bar relief." *State ex rel Pennington v Bivens*, 166 Ohio St 3d 241, 247 (2021) (emphasis added).

While, in the context of elections, promptness is critical, this is generally because courts do not wish to "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results . . . ." 29 CJS, Elections, § 459 (Oct 2022 update). But in other contexts, one court has observed, "a laches defense 'rarely prevails in election cases.' " *Bivens*, 166 Ohio St 3d at 247 (citation omitted) (noting that the defense typically applies in election cases involving absentee voter rights). The Michigan Legislature has provided for laches in the election setting: "In all civil actions brought in any circuit court of this state affecting elections, . . . there shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected." MCL 691.1031. Although this provision leaves open the possibility of finding laches in earlier-filed suits, it nevertheless indicates the Legislature's view of when this doctrine generally should apply.

The present cases were brought in September 2022, before the time frame in MCL 691.1031, and thus no rebuttable presumption of laches arises. Moreover, as Justice ZAHRA observes, the lawsuits came just eight weeks after these new rules were implemented in the August 2022 primary. And this is not a case in which the outcome will directly affect a candidate's placement on the ballot or an elector's ability to vote. The

challenged amendments to the Manual do not relate to the substantive grounds for challenging voters. The effects of these changes do not imperil voters' rights.

Even assuming that there was delay in bringing these suits, I do not believe that defendants have been sufficiently prejudiced. As the trial court noted, defendants admit that the Manual is not binding and has no legal effect, especially to the extent it is in conflict with statutory laws. As such, tweaking the handful of offending changes in the Manual would not change the substance of anything with which local elections officials *must* comply. Moreover, the changes themselves would be minor and would generally restore the status quo from before May 2022. Plaintiffs have, in fact, proposed a supplement, roughly one page in length, to the Manual that would bring it into compliance with the statutory requirements and the Court of Claims order. Instead of taking this simple step, defendants have expended much time and effort appealing the court's decision.

Defendants focus their prejudice argument on the difficulty of disseminating an updated manual and training local officials on it. On the first issue, they point to an affidavit by the Director of Elections stating that "the Bureau of Elections cannot *publish, print, and distribute statewide thousands of copies of the Election Procedures Manual at this date* . . . ." As an initial matter, it appears that in 2020, an updated version of the manual was furnished in October, shortly before the election. And defendants have not identified any law that requires the printing and physical distribution of entirely new manuals. The statute simply requires the Secretary of State to "[p]ublish and furnish" the instructions. MCL 168.31(1)(c). Defendants offer no reason why this could not be accomplished electronically. Even if printing is required, defendants could certainly provide a short, one-page supplement in line with what plaintiffs have proposed.

As for training, defendants cite the director's summary assertion that further in-person trainings would be impossible at this point. That may be so, but it is unclear why *in-person* trainings are necessary at all. For her part, the Detroit City Clerk, as amicus curiae, has provided an affidavit from a consultant for the city's Department of Elections that simply states that retraining would cause confusion, not that it is impossible. It is difficult to see how the narrow changes to the Manual, which simply bring it in line with statutes that have been on the books for years, would be onerous to describe or confusing to understand. Staff would need to be instructed that: (1) challengers do not need to use the Secretary of State's prescribed credential form; (2) challengers are not prohibited from bringing their challenges to election inspectors other than the challenger liaison; (3) challengers can possess electronic devices; and (4) election inspectors must record all challenges as they have in the past, pursuant to MCL 168.272, and not under the byzantine system created by the Secretary of State. The changes, if anything, lighten the staff's load by relieving them of enforcing an additional layer of restrictions atop those imposed by the statute. Any disruption

ultimately emanates from the Secretary of State's decision to depart from the statutes and the general practices encapsulated in past manuals.

For these reasons, I conclude that defendants have not made a strong showing that they are likely to succeed on the merits of their laches defense.

B. IRREPARABLE HARM

In light of my analysis of the laches argument, I believe that defendants will suffer little harm in complying with the law, let alone irreparable harm. Thus, I find that this factor weighs against a stay.

C. INJURY TO OTHERS AND THE PUBLIC INTEREST

The final two factors can be considered together, as defendants have put forward broad policy grounds to support the Secretary of State's changes to the Manual. Generally, defendants cite the need for efficiency and security in the election process. On their face, the Secretary of State's changes limit the ability of election observers to challenge the integrity of the election and make the vote-counting process less transparent. The Secretary of State has imposed extrastatutory requirements, the violation of which will lead to an otherwise legally authorized challenger's removal. The changes further imperil statutorily required records by creating a system of permissible and impermissible challenges that essentially forces election inspectors to adjudicate the merits of the challenge before deciding whether they even need to record it at all. It is also unclear how efficiency will be increased by creating a potential bottleneck by forcing all challenges to funnel through the challenger liaison.[15]

The state has made do without these innovations in the past. Indeed, the Secretary of State trumpeted the "accuracy, security and integrity of the November 2020 election," calling it "the most secure in history . . . ."[16] But it may prove more difficult to adjudicate any postelection challenges when the opportunity for making or recording challenges is circumscribed on the frontend. As for security, the Secretary of

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[15] The Manual requires only a single liaison at every polling place or absent voter ballot processing facility—more can be appointed, but nothing requires additional liaisons. Many cities have a single facility for processing absentee ballots, and the Legislature allows municipalities to combine their absent voter boards. MCL 168.764d. Consequently, these facilities could involve a large number of precincts but, apparently under the Secretary of State's proposal, would need to be staffed with only a single liaison.

[16] Michigan Secretary of State, *More than 250 Audits Confirm Accuracy and Integrity of Michigan's Election*, <https://www.michigan.gov/sos/

State has publicly stated that there have been "no significant attempts" in Michigan to disrupt polling places on election days in the past.[17] While defendants and some amici have noted that there have been many new applications for challengers for the upcoming election, they have not provided any evidence that these challengers threaten violence. And the statutes already provide solutions for expulsion of challengers engaging in "disorderly conduct." MCL 168.733(3). Further, at polling places, "[e]ach board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands . . . ." MCL 168.678.

Related concerns are transparency and accountability.

> [J]ust as Secretaries [of State] must work to serve the voters and citizens of their state, voters also have a responsibility to hold these statewide elections officials accountable to promoting those two sides of the . . . democracy coin . . . . Voters who wish to see elections that are accessible to all and produce accurate reflections of the people's will cannot overlook their important role in the process. In most states, voters hold the keys to ensuring their state's chief elections official oversees the elections process in a fair, transparent, and judicious manner. [Benson, *State Secretaries of State: Guardians of the Democratic Process* (New York: Routledge, 2010), p 147.]

As amicus Citizens United explains, our statutes foster these interests by allowing election challengers. The Legislature has expressly allowed designation of challengers by certain groups "interested in preserving the purity of elections and in guarding against the abuse of the elective franchise . . . ." MCL 168.730(1); see also Const 1963, art 2, § 4(2) ("Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."). These very interests are threatened by the extrastatutory restrictions placed upon challengers, who (1) will not be admitted unless their credential is on a certain form, (2) may not have adequate access to election inspectors to raise chal-

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Resources/News/2021/03/02/more-than-250-audits-confirm-accuracy-and-integrity-of-michigans-election> (accessed November 2, 2022) [https://perma.cc/RBP7-UGFQ].

[17] CBS News, Transcript: Michigan Secretary of State Jocelyn Benson on "Face the Nation" (September 4, 2022) <https://www.cbsnews.com/news/jocelyn-benson-face-the-nation-transcript-09-04-2022/> (accessed November 2, 2022) [https://perma.cc/T5X7-L8HT].

lenges, (3) are deprived of their cellphones, (4) may not have their challenges recorded, and (5) are threatened with expulsion for noncompliance.[18]

For these reasons, I believe the public interest weighs against a stay.

IV. CONCLUSION

In sum, I believe that defendants have not met the appropriate standard for a stay, and I would deny their motion accordingly. None of the relevant factors weighs in favor of the stay. The result of the majority's order is that the Secretary of State's changes to the Manual —even though found improper by the only court to consider them—will apply in the upcoming election. Defendants have thus been handed a victory for this election, when it matters most. Because a stay is unwarranted, I dissent.

Summary Disposition November 4, 2022:

PEOPLE V SOSBY, No. 160741; Court of Appeals No. 349773. By order of June 1, 2021, the application for leave to appeal the November 19, 2019 order of the Court of Appeals was held in abeyance pending the decision in *People v Stovall* (Docket No. 162425). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 301 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the sentence of the Lenawee Circuit Court, and REMAND this case to that court for resentencing. The defendant's parolable life sentence for second-degree murder, committed when he was under the age of 18, is cruel or unusual punishment in violation of Const 1963, art 1, § 16. *Stovall*, *supra*. In all other respects, leave to appeal is DENIED, because the defendant has failed

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[18] Justice BERNSTEIN anticipates that because the Secretary of State's new instructions did not cause significant disruption to the primary election, the general election will similarly proceed without incident. I hope he is right. But voter turnout in general elections is generally much higher than turnout in primary elections. Just over two million Michiganders voted in the 2022 primary election. See Michigan Secretary of State, *2022 Michigan Election Voter Turnout* <https://mielections.us/election/results/2022PRI_CENR_TURNOUT.html> (accessed November 3, 2022) [https://perma.cc/VMU2-BANM] (showing that 2,167,798 voters participated). If the past few elections are any indication, we can expect at least twice as many voters to cast their ballots during this year's general election. See Michigan Secretary of State, *Election Results and Data* <https://www.michigan.gov/sos/elections/election-results-and-data> (accessed November 3, 2022) [https://perma.cc/M648-PPQK].

to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for appointment of counsel is DENIED as moot. We do not retain jurisdiction.

ZAHRA, J. (*concurring*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 332, 347-362 (2022), I do not believe defendant's parolable life sentence for second-degree murder committed when he was under the age of 18 amounts to cruel or unusual punishment under Const 1963, art 1, § 16. While I continue to believe *Stovall* was wrongly decided, I accept the will of the Court and capitulate that resentencing is warranted under the majority opinion in *Stovall*.

VIVIANO, J., (*concurring in part and dissenting in part*). For the reasons stated by Justice ZAHRA in his dissent in *People v Stovall*, 510 Mich 301, 332, 347-362 (2022), I do not believe that defendant's parolable life sentence for second-degree murder is cruel or unusual punishment in violation of Const 1963, art 1, § 16. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

PEOPLE v MCMULLEN, No. 164172; Court of Appeals No. 359436. By order of July 1, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the January 18, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration, as on leave granted, limited to whether: (1) the sentence imposed by the Saginaw Circuit Court was reasonable and the circuit court adequately justified the extent of the particular departure on the record; and (2) the circuit court erred by denying the defendant's request to waive the 20% late fee and set aside the order to remit prisoner funds. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

In re BAIRD/WHITE, No. 164519; Court of Appeals No. 358180. On order of the Court, the application for leave to appeal the May 19, 2022 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III.B of the judgment of the Court of Appeals addressing the respondent-mother's claim of ineffective assistance of trial counsel. We REMAND this case to the Court of Appeals which, while retaining jurisdiction, shall remand this case to the Roscommon Circuit Court to allow the respondent-mother to discover AW's medical records and to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973). At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall address the issues presented by the respondent-mother. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should now be reviewed by this Court. We do not retain jurisdiction.

ZAHRA and VIVIANO, JJ., would deny leave to appeal.

Oral Argument Ordered on the Application for Leave to Appeal November 4, 2022:

PEOPLE v SALE, No. 164339; Court of Appeals No. 355540. The parties shall address: (1) whether the trial court erred by excluding extrinsic evidence related to a witness's character for truthfulness or untruthfulness, see MRE 608(b); and (2) if so, whether the exclusion of the extrinsic evidence was more likely than not outcome determinative, see *People v Douglas*, 496 Mich 557 (2014); *People v Armstrong*, 490 Mich 281 (2011).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MICHIGAN HEAD AND SPINE INSTITUTE v MID-CENTURY INSURANCE CO, No. 164644; Court of Appeals No. 357144. The parties shall address: (1) whether an insurance policy can expand the class of persons eligible to receive personal protection insurance (PIP) benefits beyond that set forth by the no-fault act, MCL 500.3101 *et seq*., see *Meemic Ins Co v Fortson*, 506 Mich 287, 298 (2020); *Lewis v Farmers Ins Exch*, 315 Mich App 202, 210 (2016); (2) if so, whether the insurance policy issued by Mid-Century Insurance Company in this case expanded the class of persons to include intervening plaintiff Stacey Krebs; and (3) whether the plaintiffs have standing as third-party beneficiaries to claim PIP benefits under that policy. See MCL 600.1405(1).

The Coalition Protecting Auto No-Fault, the Insurance Alliance of Michigan, Michigan Defense Trial Counsel, Inc., and the Michigan Association for Justice are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 4, 2022:

GORDON v GORDON, No. 164611; Court of Appeals No. 359658.

MCCORMACK, C.J. (*concurring*). I concur in the Court's decision to deny leave, because appellant failed to object to the referee's report and recommendation within the time mandated by MCR 3.215(E)(4). I write separately, however, to emphasize the systemic problem at the heart of this case: the fact that self-represented litigants must navigate rules and processes devised by lawyers and judges for lawyers and judges in cases where the stakes are as high as the right to parent your own child.

The number of people navigating civil-justice problems without lawyers has grown exponentially over the last two decades. In 2022, 74% of low-income households in the United States experienced at least one civil legal problem in the past year, but these individuals sought legal assistance for only 25% of the problems that substantially impacted their lives. See Legal Services Corporation, *2022 Justice Gap Study*

<https://justicegap.lsc.gov/resource/executive-summary/> (accessed October 27, 2022) [https://perma.cc/24SY-4837]. The cost of counsel is simply prohibitive. While Legal Service Corporation-funded organizations help many low-income litigants, this year these organizations turned down 49% of the 1.9 million requests for assistance received. *Id*. Even when they could assist, legal-services organizations only had the resources to fully resolve 56% of cases. *Id*. Michigan is not exempt from this national trend: as of 2015, there were 285 legal-aid attorneys providing services for an estimated 1,961,687 low-income individuals. See State Bar of Michigan, *Documenting the Justice Gap in Michigan* (Spring 2017 update) <https://www.michbar.org/file/programs/atj/pdfs/JusticeGap.pdf> (accessed October 27, 2022) [https://perma.cc/RTD9-4ZK7]. We well know the devastating consequences of attempting to navigate our complex legal system without a lawyer.[1] And we won't be able to lawyer our way out of this dilemma.

Michigan is fighting the access-to-justice crisis on many fronts. One is getting people the information they need to be able to exercise their legal rights. McCormack, *Access to Justice Requires Plain Language*, 100 Mich B J 44, 45 (February 2021). For example, our courts maintain a website with resources—like a handbook of legal terms and a guide to handling civil appeals—for self-represented litigants.[2] "Michigan Legal Help" provides practical, easy-to-follow, web-based information for people navigating justice issues without lawyers.[3] And the Justice for All Commission is working on additional innovations to give people the tools they need to understand and resolve their legal problems.[4] These are steps in the right direction, but we can do more yet.

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[1] See, e.g., Kroeper et al, *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*, 26 Psychol, Pub Pol'y, & L 198, 199 (2020); Seron et al, *The Impact of Legal Counsel on the Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L & Soc'y Rev 419, 428 (2001); Rulli & Rieser, *Assuring Access to* Pro Se *Litigants in the Courtroom*, Philadelphia Law 23-24 (Winter 2022).

[2] Michigan Courts, *Pro Per Manuals* <https://www.courts.michigan.gov/courts/court-of-appeals/clerks-office/pro-per-manuals/> (accessed October 27, 2022) [https://perma.cc/5UTN-W66G]; Michigan Courts, *Self-Represented Litigants* <https://www.courts.michigan.gov/resources-for/the-public/self-represented-litigants/> (accessed October 27, 2022) [https://perma.cc/LMJ2-PPHA].

[3] Michigan Legal Help, *Self-Help Tools* <https://michiganlegalhelp.org/self-help-tools> (accessed October 27, 2022) [https://perma.cc/PLU6-Q4MC].

[4] Michigan Courts, *Justice for All* <https://www.courts.michigan.gov/administration/special-initiatives/justice-for-all-commission/> (accessed October 27, 2022).

Rather than putting the burden on self-represented litigants to master rules and processes built by lawyers and judges for lawyers and judges, we should meet them where they are. Simplifying court processes and using plain language will help, and judges can be part of this solution. To start, this Court should consider adopting the American Bar Association's 2007 amendment to Rule 2.2 of the Model Code of Judicial Conduct. Rule 2.2 has long required judges to "perform all duties of judicial office fairly and impartially," but the 2007 amendment added, "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard." See also Rulli & Rieser, *Assuring Access to* Pro Se *Litigants in the Courtroom*, Philadelphia Law 26 (Winter 2022). Many states, from California to Indiana, have adopted some version of this rule, along with examples of reasonable accommodations.[5] *Id*. By adopting the amendment to this rule and encouraging accommodations for self-represented litigants, we can ensure greater and better access to justice in Michigan. This, in turn, will grow the public's confidence in the judiciary and thereby enhance the rule of law.

AEY CAPITAL, LLC v CITY OF UTICA, No. 164823; Court of Appeals No. 360705.

Superintending Control Denied November 4, 2022:

NIENSTEDT v SECRETARY OF STATE, No. 164807.

VIVIANO, J. (*concurring*). Plaintiff filed this case to obtain an order requiring that the full language of all proposed constitutional amendments be sent to absentee voters along with their absentee ballots. I agree with this Court's denial order because there is currently no legal requirement that voters receive a copy of the full text of proposed constitutional amendments. I write, however, because I believe there should be.

The language of the law matters. Any rule that obscures the law's text from the people to whom it applies would be fundamentally unjust.

[https://perma.cc/3CSY-HU4P]. The Commission's strategic plan highlights "understandability"—ensuring that people can meaningfully engage with the civil justice system and use its tools to help address their problems, regardless of their level of experience—as key to improving access to justice. Michigan Justice for All Taskforce, *Strategic Plan and Inventory Report* (December 2020) <https://www.courts.michigan.gov/4af54d/siteassets/committees,-boards-special-initiatves/justiceforall/final-jfa-report-121420.pdf> (accessed October 27, 2022) [https://perma.cc/G3N8-GRBH].

[5] "Reasonable accommodations" vary from state to state, but may include liberally construing pleadings and opportunities to amend, modifying the traditional order of taking evidence and hearing argument, and permitting narrative testimony. *Id*.

See Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179 (1989) ("It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress. As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean."). The same is true even when the text is available but incomprehensible to an ordinary reader or nearly so. After the Norman conquest of England, "law French" became the language used in judicial proceedings. Mellinkoff, *The Language of the Law* (Boston: Little, Brown and Company, 1963), pp 95-96. But commoners could not speak this language, and law became inaccessible to average subjects of the realm. *Id*. at 101. When Parliament remedied this situation in 1362 in the Statute of Pleading, making English the language of the law, it expressed the purpose that "every Man of the said Realm may the better govern himself without offending of the Law, and the better keep, save, and defend his Heritage and Possessions . . . ." Statute of Pleading, 36 Edw III c 15 (1362); but see *The Language of the Law*, pp 112-113 (noting the persistent use of Law French after the Statute of Pleading).

The importance of clear and comprehensible language in our laws has not diminished over the centuries. If anything, the rapid proliferation of statutory and regulatory laws makes the comprehensibility and accessibility of legal texts more critical than ever. A significant portion of the modern appellate judge's job is to parse the language of constitutions, statutes, regulations, and other rules and sources of law. As in most modes of communication, it is generally a safe assumption that the language in such texts was chosen deliberately. Cf. *Pohutski v City of Allen Park*, 465 Mich 675, 683-684 (2002) (" 'The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.' ") (citation omitted). Indeed, in the constitutional sphere, our fundamental interpretive principle is that the text means what it was commonly understood by the ratifiers to mean—a principle that would hardly be possible if the ratifiers had no opportunity to read and understand the text they were enacting into law. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 61 (2018).

Yet when it comes time for Michiganders to vote on constitutional amendments, our laws provide voters with no real opportunity to read and understand the proposed amendments. In Michigan, the full text of constitutional amendments is not sent to voters and does not appear on the ballot itself.[1] In fact, the only individuals presented with the "full

[1] Instead, only a 100-word summary "of the purpose of the proposed amendment" appears on the ballot. Const 1963, art 12, § 2. Copies of the text of constitutional amendments must be posted "in conspicuous places in the room where the election is held." MCL 168.480. But this, of course, does not aid absentee voters and even for poll voters does not, in my view, provide an adequate opportunity to read and consider proposed amendments that can be thousands of words long. Finally, while the

text" of the amendment are those who are asked, at a much earlier stage of the process, to sign the petition to place the amendment on the ballot. Const 1963, art 12, § 2; MCL 168.482(3).[2] But when this Court recently considered the petition requirement, a majority concluded that the pervasive lack of spacing between words in the amendment at issue was no obstacle to its placement on the ballot. *Reproductive Freedom for All v Bd of State Canvassers*, 510 Mich 894, 894-895 (2022). As my dissent in that case explained, spacing between words is a critical and long-standing practice that "facilitates reading and comprehension . . . ." *Id.* at 913 (VIVIANO, J., dissenting). When reading and comprehension are thus impeded, the lone official chance of even this smaller subset of voters to review the full text of the law is made hollow.

If this Court is not going to take seriously the only official presentation of the amendments to the relatively small number of petition signers, then perhaps it is time for the Legislature to take up this issue and devise a means to formally provide the actual proposed text to voters. Other states have found ways to do so. California, for example, requires the Secretary of State to send to voters, at least 40 days before an election, a guide containing information about the proposed laws to be passed upon at the election. Cal Elections Code 9094(a). In addition to containing discussion of each ballot measure, the guide must contain a link "identifying the location on the Secretary of State's internet website of the complete text of the state measure," and it must advise the voter that a printed copy is available upon request. Cal Elections Code 9086(f). Arizona similarly requires its Secretary of State to prepare a pamphlet that contains "[a] true copy of the title and text of the measure or proposed amendment" being put before the voters by initiative or referendum. Ariz Rev Stat Ann 19-123(A)(1). A copy of the pamphlet is available online and must be mailed to every household with a registered voter (or can be e-mailed, instead, upon request). Ariz Rev Stat Ann 19-123(C). Measures such as these ensure that voters can take time to study the actual text of the proposed law that they will be asked to vote upon in the election.

There are no comparable provisions in our law. Instead, as noted, the single time our law provides for at least some voters to be formally presented with the proposed text is when they sign a petition to put it on the ballot. Voters who take direct part in the democratic process deserve more than this. The products of our direct-democracy process should reflect the reasoned deliberation of the people. For the process to properly function, voters need a full and fair chance to read and consider

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Secretary of State must post the petition language online, MCL 168.483a(3), no notice of either the physical or online postings is provided to voters.

[2] As I noted previously, this usually occurs in conditions unconducive to meaningful reflection upon the proposed law. See *Reproductive Freedom for All v Bd of State Canvassers*, 510 Mich 894, 913 (2022) (VIVIANO, J., dissenting).

the words that may govern them and the state. I strongly encourage the Legislature to consider adopting a requirement that voters be provided with the full text of any proposed constitutional amendments or laws that they will be asked to vote upon.

Summary Disposition November 10, 2022:

WADE v UNIVERSITY OF MICHIGAN, No. 156150; reported below: 320 Mich App 1. By order of November 6, 2020, the application for leave to appeal the June 6, 2017 judgment of the Court of Appeals was granted. On order of the Court, and on the Court's own motion, we VACATE our order dated November 6, 2020, VACATE the June 6, 2017 judgment of the Court of Appeals, and REMAND this case to that court for consideration in light of *New York State Rifle & Pistol Ass'n, Inc, et al v Bruen*, 597 US 1 (2022). We do not retain jurisdiction.

VIVIANO, J. (*concurring*). The Court today remands to the Court of Appeals an important case concerning the constitutionality of the University of Michigan's prohibition of firearms on campus. The United States Supreme Court recently elucidated the structure of the required analysis in *New York State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US 1 (2022). I write to offer a few thoughts about how that analysis might apply here.

Presently, the University of Michigan bans firearms on campus unless, among a few other exceptions, the University's Director of Public Safety waives the prohibition for an individual "based on extraordinary circumstances." Plaintiff has challenged that ban on firearms as a violation of his Second Amendment right to bear arms. In rejecting his contentions, the Court of Appeals applied a two-part test: (1) "The threshold inquiry is whether the challenged regulation 'regulates conduct that falls within the scope of the Second Amendment right as historically understood,' " (2) and then, if the conduct is within the Second Amendment's scope, the court employs intermediate scrutiny to see whether there is " 'a reasonable fit between the asserted interest or objective and the burden placed on an individual's Second Amendment right.' " *Wade v Univ of Mich*, 320 Mich App 1, 13 (2017) (citations omitted).

To support its threshold analysis, the Court of Appeals relied on the statement in *Dist of Columbia v Heller*, 554 US 570, 626-627 (2008), that the Second Amendment did not disturb "longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ." In the present case, the Court of Appeals' entire "historical analysis" was to examine one dictionary from 1828 to determine whether universities were considered "school[s]" in 1868. *Wade*, 320 Mich App at 14.[1] Even if one concludes that the Court of Appeals reached the correct result, this paltry review of the main question is inadequate. Moreover, it is not at all apparent

[1] The Court focused on 1868, when the Fourteenth Amendment was ratified, but as the Supreme Court in *Bruen* observed, there is some

that *Heller*'s brief discussion of sensitive places was intended to establish a rule that all entities historically known as "schools" could permissibly ban firearms, meaning the only question that would remain for future cases is whether the entity at issue was considered a "school." Nor is it even clear that the Court meant to include universities and colleges in its reference to "schools," let alone to say that such locations can completely ban firearms. See Note, *Guns on Campus: Continuing Controversy*, 38 J C & U L 663, 667-668 (2012) (noting that *Heller* did not address guns on university campuses or define "schools" to include higher education).

In its recent decision on this topic, the Supreme Court rejected the two-part inquiry applied by the Court of Appeals and instead replaced it with an examination of "whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen*, 597 US at 26. This test requires courts to examine any historical analogues of the modern regulation to determine how these types of regulations were viewed. *Id*. If there are no such analogues on the societal problem at issue, that historical silence "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id*. "Likewise," the Court continued, "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id* at 26-27. Further, if regulations like the one at issue had been proposed and "rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Id*. at 27. At base, the analysis requires "reasoning by analogy," which means the court must determine "whether a historical regulation is a proper analogue for a distinctly modern firearm regulation" by assessing "whether the two regulations are 'relevantly similar.' " *Id*. at 28-29 (citation omitted). In this assessment, two metrics are useful: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 29. But the modern regulation need not be "a dead ringer for historical precursors . . . ." *Id*. at 30.

In the present case, I believe there are at least two historical investigations needed to determine whether the University of Michigan's firearm regulation is constitutional. First, the Court of Appeals should consider whether there were any analogous firearm regulations on university and college campuses in the relevant historical period. In my own initial review of historical laws concerning campus carry, I have come across a few that contain partial restrictions of guns on campus.[2]

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debate as to whether the relevant historical point is 1868 or instead 1791, when the Second Amendment was ratified. *Bruen*, 597 US at 37-38.

[2] See 1878 Miss Laws, ch 46, § 4 ("[A]ny student of any university, college or school, who shall carry concealed, in whole or in part, any weapon of the kind or description in the first section of this Act described, or any teacher, instructor, or professor who shall, knowingly,

The secondary literature notes the prevalence of gun restrictions on campus in the colonial and early republic periods, but like the laws just mentioned, none seems to have been a campuswide ban generally prohibiting open or concealed carry.[3]

In addition to more thoroughly researching historical restrictions in this context, the parties and the Court of Appeals should assess whether the more limited regulations noted above are nonetheless historically analogous to the modern regulation at issue here. Do they burden the right to self-defense in the same manner and for the same purposes? *Bruen*, 597 US at 29. And of course, any relevant historical discussion of these regulations, or the broader right of college-aged adults to bear firearms, should be examined. See, e.g., *Firearms Policy Coalition, Inc v McCraw*, 623 F Supp 3d 740 (ND Tex, 2022) (examining the text and history of the Second Amendment and holding unconstitutional a prohibition on 18- to 20-year-olds from carrying a handgun outside the home for self-defense).

I believe a second historical inquiry is required in this case. Even if certain restrictions were historically permitted on college campuses,

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suffer or permit any such weapon to be carried by any student or pupil, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not exceeding three hundred dollars, and if the fine and costs are not paid, condemned to hard labor under the direction of the board of supervisors or of the court."); 1879 Mo RS, ch 24, § 1276 (prohibiting the discharge of a firearm "in the immediate vicinity of . . . [a] building used for school or college purposes"); 2 1883 Wis Sess Laws 841, ch 184, tit 12, § 162 (amending the city charter of Neenah to prohibit individuals within a "school house" or any "building" within the city from firing a gun); see also 1890 Okla Territorial Statutes, ch 25, art 47, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering, or to any election, or to any place where intoxicating liquors are sold, or to any political convention, or to any other public assembly, any of the weapons designated in sections one and two of this article.").

[3] See Kopel & Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L Rev 205, 249-252 (2018) (noting nineteenth-century campus firearms restrictions and arguing that none of them supported the designation of campuses as sensitive places where arms could be banned); see also Rostron, *The Second Amendment on Campus*, 14 Geo J L & Pub Pol'y 245, 255-257 (2016); Brady, *"Campus-Carry" Laws on Public College Campuses: Can Social Science Research Inform State Legislative Decision-Making?*, 350 Ed Law Rep 1, 6 (2018).

another important question arises: are large modern campuses like the University of Michigan's so dispersed and multifaceted that a total campus ban would now cover areas that historically would not have had any restrictions? In other words, are historical campuses the best analogy for the modern campus? It appears that campuses have always contained expansive outdoor settings. See Olin, *The Campus: An American Landscape*, 8 SiteLINES: A Journal of Place 3, 3 (Spring 2013) (noting that early American colleges were "simply a set of Georgian buildings placed in the open" and "set off by relatively level or gently sloping areas of turf and trees"). And some early schools, like the College of Philadelphia (1754), might have had a more modern feel, with "buildings scattered amid ordinary city blocks[.]" *Id*. at 4.

Nonetheless, it seems apparent that large, modern university campuses differ from their historical antecedents. Many are involved in urban planning with mixed-use projects that include shops and nonstudent residences. See, e.g., *id*. at 8-9 (discussing the University of Pennsylvania's experience in the late 1990s and early 2000s and noting that many other universities have employed similar models); Matthew Dalbey et al, *Communities of Opportunity: Smart Growth Strategies for Colleges and Universities*, National Association of College and University Business Officers (2007), pp 1-3 (noting that in 2006 $14.4 billion of construction on campuses occurred and advocating for mixed-use developments of shops, offices, housing, and schools). The University of Michigan itself occupies nearly one-tenth of Ann Arbor. Many areas on campus, such as roadways, open areas, shopping districts, or restaurants, might not fit the "sensitive place" model suggested by *Heller*—they may instead be more historically analogous to other locations that did not have gun restrictions. And because the campus is so entwined with the surrounding community, the ban might also burden carrying rights on locations outside campus, as many individuals will regularly go from campus to off-campus environments, even in a single trip; because they cannot bring a gun on campus, they will not feasibly be able to bring the gun to the off-campus locations either.[4]

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[4] See, e.g., Note, *Rethinking the Nevada Campus Protection Act: Future Challenges & Reaching a Legislative Compromise*, 15 Nev L J 389, 421-422 (2014) ("Current laws and university policies that prohibit any degree of campus carry leave [carrying a concealed firearm] permit holders defenseless anywhere between college campuses and home. The professor that stops for groceries after work; the student that stops for gas across the street from campus; these are the real and unfortunately less documented dangers of 'no permission to campus carry' states."); *id*. at 425 ("The line that separates some universities from public property is fuzzy, and attempting to classify universities as a 'sensitive place' poses a significant problem. Universities are typically intermingled with other services and public property."); *Guns on Campus*, 38 J C & U L at 675 ("Additionally, some colleges and universities do not have the clearly defined perimeters that high schools, middle schools, and elementary

I believe that these considerations are necessary in the present case when applying the governing framework from *Bruen*. Because they require careful analysis of historical materials, I agree that a remand is appropriate.

BERNSTEIN, J., did not participate.

Leave to Appeal Denied November 10, 2022:

PEOPLE v GOBRICK, No. 164080; Court of Appeals No. 352180.

WELCH, J. (*concurring*). I agree with the Court's decision to deny leave to appeal. I write separately to address the Court of Appeals' use of gender-neutral pronouns in the majority opinion after defendant requested to be identified using the pronoun "they." Our vocabulary and the ways that we refer to each other has changed through the decades. While at one point a judge might have said "thou shalt respect all thy litigants," we now say "you shall respect all your litigants." And while the archaism "Hear ye, hear ye" persists for the court crier, we no longer use the term "ye"—rather than you—to refer to more than one person. Instead, whether "you" refers to one person or a group depends upon the context—something readers of the English language understand and are able to decipher.

Judge BOONSTRA's concurring opinion sets forth his belief that the majority was "altering its lexicon" in a manner contrary to what, in his view, society understands to be an "immutable truth." *People v Gobrick*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2021 (Docket No. 352180) (BOONSTRA, J., concurring), p 1. But lexicographers and the authors of English style guides have long changed practices to reflect the evolution of the English lexicon. This is hardly controversial.[1] As society evolves so does its language. While

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schools usually have. Some colleges and universities span across cityscapes and mix with metropolitan areas. The physical layout of some colleges and universities can easily create confusion for individuals trying to determine if they are on campus or off campus at any given point. For example, public roads often run through college campuses. Could a public road be considered a sensitive school area subject to a reasonable regulation, or would the street merely be part of the public landscape where the same regulation would be unreasonable?").

[1] While Judge BOONSTRA claims in his concurrence that the " 'wokeness' of the day" was the motivation for the court's use of a gender-neutral pronoun, it is interesting to note that in 1994 the United States Supreme Court easily avoided using gendered pronouns in a decision involving a transgender party. See *Farmer v Brennan*, 511 US 825 (1994) (a case concerning a transgender inmate who alleged discrimination based on petitioner's transgender status). In that opinion, Justice Souter avoided the use of gendered pronouns even in the absence of an explicit request for such an accommodation. Further, while not as prevalent in our lexicon as it is today, the use of "they" as a singular

there might be instances where adoption of a novel change in the English lexicon could cause confusion, this was not such a situation. The Court of Appeals majority provided a detailed explanation in a footnote as to how and why it was using a gender-neutral pronoun in its opinion. The Court of Appeals' simple use of a footnote and gender-neutral pronoun demonstrates that words matter and that a small change to an opinion, even if unrelated to the merits, can go a long way toward ensuring our courts are viewed as open and fair to all who appear before them.

MCCORMACK, C.J., joins the statement of WELCH, J.

In re GM DIXSON, No. 164625; Court of Appeals No. 358376.

MCCORMACK, C.J. (*dissenting*). I respectfully dissent from the Court's decision to deny leave because I do not believe the trial court should have terminated the respondent-mother's parental rights to her daughter. In my view, the child welfare system failed this family, and this failure is not anomalous. It illustrates the everyday problems of our child welfare system and how the legal standards put in place to protect families can work against them.

I. FACTS AND PROCEDURAL HISTORY

The respondent-mother and her daughter GMD became involved with the court when GMD's infant half-sister died of accidental asphyxiation from unsafe sleep practices in 2017. Child Protective Services learned that GMD, who was 18 months old, was living with family friends from church, the B Family. The respondent-mother needed some time to find suitable housing and to pursue her education and knew GMD would be well cared for there. But the arrangement was informal; the respondent-mother never set up a legal guardianship for GMD. And so, the Department of Health and Human Services (DHHS) petitioned to take temporary jurisdiction over GMD. She remained with the B Family while they completed the certification process to become licensed foster

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pronoun extends back to as early as the 1300s. See, e.g., Merriam-Webster.com Dictionary, *Singular 'They'* <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> (accessed November 3, 2022) [https://perma.cc/TU4G-44FA]; Professor Dennis Baron, Oxford English Dictionary Blog, *A Brief History of Singular 'They'* <https://public.oed.com/blog/a-brief-history-of-singular-they/> (posted September 4, 2018) (accessed November 3, 2022) [https://perma.cc/8486-N8UP]; Curzan, *Opinion: 'They' Has Been a Singular Pronoun for Centuries. Don't Let Anyone Tell You It's Wrong*, Washington Post (October 21, 2021) <https://www.washingtonpost.com/opinions/2021/10/21/they-has-been-singular-pronoun-forever-dont-let-anyone-tell-you-its-wrong/> (accessed November 3, 2022) [https://perma.cc/Z52D-EQR9].

parents. For the next six years while the court considered GMD's future, she lived with the B Family and had regular visits with her mom.

When this case began in 2017, the respondent-mother was in a romantic relationship with MJ. The two had a son in October 2019. Now, MJ has full legal and physical custody of their son, and the respondent-mother has regular visits. The respondent-mother also has two older daughters who are in a guardianship with their grandmother. The respondent-mother has regular visits with them, too.

When the court took temporary jurisdiction over GMD, the respondent-mother received a treatment plan. The treatment plan required her to find suitable housing and employment and participate in parenting classes and therapy. In 2020, after concluding that the respondent-mother had failed to benefit from services it offered, DHHS filed a supplemental petition seeking to terminate her parental rights.

As evidence that the respondent-mother had failed to benefit from services, the petition alleged inadequate parenting skills during visits with GMD, a struggle to maintain healthy relationships, and difficulties following through with mental health treatment like medication and therapy. The complaint referred to an argument between the respondent-mother and her then-boyfriend MJ in the DHHS office as evidence that she hadn't benefited from domestic-violence and anger-management services. Her continued relationship with MJ was evidence that she wasn't making healthy choices for her family.

A supplemental petition seeking to terminate a parent's rights only starts the process of termination. After DHHS filed the petition, the trial court conducted a series of hearings to determine whether there was clear and convincing evidence that "[t]he conditions that led to the adjudication continue to exist," MCL 712A.19b(3)(c)(*i*); the respondent-mother "fail[ed] to provide proper care or custody for the child," MCL 712A.19b(3)(g); or there is a "reasonable likelihood . . . that the child will be harmed if . . . returned to the home of the parent," MCL 712A.19b(3)(j).

Because of the COVID-19 pandemic, these hearings were delayed and ended up spanning from February 2020 to May 2021. The testimony at these hearings established that the respondent-mother had resolved many issues that led the court to take temporary, and then permanent, jurisdiction over GMD. She obtained a Section 8 housing voucher and a two-bedroom apartment she could afford. She found a job working at a nursing home to supplement monthly disability payments. After the birth of her son in October 2019, she stopped seeing MJ romantically; she only saw him at scheduled visits with her son.

The respondent-mother had completed parenting classes and therapy on domestic violence and anger management. But the initial opinion of the foster care worker assigned to GMD's case—Aliesha Alston—was that the respondent-mother had failed to benefit from these services. Alston's evidence of the alleged failure came from observations during supervised visits between GMD and the respondent-mother. The respondent-mother was "inconsistent" during visits and "struggle[d] to make proper parent choices." She missed some visits, but only because of emergency room visits associated with her

high-risk pregnancy with her son. And by May 2021, Alston changed her mind. She explained that the respondent-mother "*did* benefit" as evidenced by "growth in regards to how to handle [GMD]." (Emphasis added.)

Alston also initially cited the respondent-mother's relationship with MJ as evidence that the respondent-mother failed to benefit from domestic-violence therapy. But of course, by the time these hearings concluded in May 2021, the respondent-mother hadn't been seeing MJ romantically for over a year and a half.

The respondent-mother's mental health was stable during the termination hearings. In February 2020, Alston testified that the respondent-mother had started taking her medication and participating in services. And the respondent-mother testified that she felt she had benefited from therapy, explaining in March 2020 that "me and [GMD] have a closer bond than we had before now."

But her mental health hadn't always been quite so stable. While the hearings were suspended because of the pandemic, Alston learned from the respondent-mother's father that the respondent-mother was struggling with her mental health. She was having trouble keeping her apartment clean and was acting erratically. At one point, when he picked her up in his car and she was not taking her medication, she grabbed the steering wheel from him while he drove.

But by May 2021, the respondent-mother testified that she was once again taking her medication and seeing her therapist twice a week. And her father confirmed it, explaining that since November 2020, "she's been doing excellent . . . keeping her house up to date [and] taking her medication."

Everyone who testified agreed that GMD and the respondent-mother had a strong bond. GMD loved the respondent-mother and the respondent-mother loved GMD. During visits, Alston testified that the respondent-mother was "happy to see [GMD]. She often ask[ed] her about her day. And she [was] very involved in the activities." Alston reiterated the same in May 2021. And seven-year-old GMD expressed an interest in continuing to see her mom and her half-siblings.

As clear as it was that GMD loved her mom, it was also clear from the testimony of caseworkers who interacted with GMD that she had been understandably unsettled by the ongoing custody dispute. Because she didn't know what would happen to her, she felt anxious and sometimes acted out. She wanted the case to be over and to feel settled. She called the B Family parents Mom and Dad, and she wanted to continue living with them. Their home was the only home she remembered. But she also wanted to keep seeing the respondent-mother.

In May 2021, the trial court terminated the respondent-mother's parental rights. It found clear and convincing evidence that "the conditions that led to this adjudication . . . continue to exist today" and that "it would not be safe for the child to be returned . . . to the mother at this time or at a point in time in the reasonably foreseeable future." It cited the respondent-mother's ongoing struggles with mental health and the fact that she had driven on a suspended license to get to court that day. The court feared that GMD's well-being would be harmed if she

was returned to her mother's care full-time, because she had a strong attachment with the B Family. At no point during the termination hearings did anyone—the DHHS staff, the respondent-mother's attorney, the lawyer-guardian ad litem, the judge—consider any other possible arrangement. Everyone focused solely on two choices: full custody or full termination.

The respondent-mother appealed the decision in the Court of Appeals. After reviewing her case, a panel affirmed the trial court's decision to terminate parental rights. The respondent-mother sought leave to appeal here.

The respondent-mother and GMD's case is both tragic and frustratingly commonplace. A mom expressed a strong interest to remain a part of her daughter's life. Her daughter expressed a similarly strong interest to see her mom. And yet the best our legal system has to offer them is a complete severing of their legal relationship, with no consideration of creative solutions that would benefit the whole family. I wish this case was an outlier. But in ten years reviewing records in termination cases, I have seen many just like this where our statutory process for protecting children has failed them. That is, the legal structure that governs these proceedings disserved the people it is supposed to protect. The respondent-mother and GMD deserve better. Indeed, we owe every family in the child-protection system more.

II. THE HARM OF REMOVAL

When the court took temporary jurisdiction over GMD back in 2017, thankfully, her day-to-day life didn't change. Because she was living with the B Family before court involvement and they were allowed to keep her in their home while becoming certified foster parents, these proceedings did not begin the way most child welfare cases do: with the forcible removal of the child from home. Although GMD was spared that trauma, most children are not.

Before a court can remove a child from their parent, it must make certain findings about the harm a child would face at home, the reasonable efforts made to prevent removal, and whether any other remedy could protect the child. MCL 712A.14b. While courts must consider whether "[t]here is reasonable cause to believe that the child is at substantial risk of harm" with their parents, there is no requirement to consider the "substantial risk of harm" from removal, despite the clear evidence that removal has lasting negative effects on a child's mental and physical well-being into adulthood.

Separating a child from their family increases the likelihood that a child will suffer from attachment disorders and separation anxiety, even when families are eventually reunited. Trivedi, *The Harm of Child Removal*, 43 NYU Rev L & Soc Change 523, 530-531 (2019). No matter what happens after removal, the disruption a child experiences when separated from their family creates a feeling of "ambiguous loss" that can lead to lasting detrimental mental and physical health effects. *Id*. at

533; see also Sankaran, Church, & Mitchell, *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq L Rev 1161 (2019).

Once removed, while some children may be placed with a relative, many more land in foster care with strangers. Sadly, foster care can be unsafe too. In fact, children in foster care are more likely to be physically and sexually abused than other children. *The Harm of Removal*, 43 NYU Rev L & Soc Change at 542-543. Foster care can cause tremendous instability, as many children experience "foster care drift," bouncing between multiple unstable placements for years until they age out of care. *Id*. at 544. Foster care placements can also be neglectful. According to the American Academy of Pediatrics, " '[c]hildren and adolescents in foster care have a higher prevalence of physical, developmental, dental, and behavioral health conditions than any other group of children,' " even when controlling for poverty. *Id*. at 546-547 (citation omitted). Routine medical care, dental care, and necessities often slip through the cracks.

Time spent in foster care leads to worse mental and physical health outcomes into adulthood. Children who have experienced foster care are "five times more likely to be diagnosed with depression, four times more likely to be diagnosed with ADHD, and ten times more likely to be diagnosed with bipolar disorder than other children[.]" Wildeman & Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000–2011*, 9 PLoS ONE 1, 1 (2014). Moving into adulthood, children who spend time in foster care are at a higher risk for "low educational attainment, homelessness, unemployment, economic hardship, unplanned pregnancies, mental health disorders, and criminal justice involvement." Dettlaff & Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?* 692 Annals Am Acad Pol & Soc Sci, 253, 255 (2020). Foster care placement predicts atypically high rates of depression, post-traumatic stress disorder, and drug addiction. *The Harm of Removal*, 43 NYU Rev L & Soc Change at 549-551.

The harms of removal and sometimes also foster care can produce "worse long-term outcomes than if the child had remained at home" in many cases. *Id*. at 541 (emphasis omitted). But Michigan's removal statutes do not require courts to balance these harms against the harm that might result from staying home.

III. (UN)REASONABLE EFFORTS

In Michigan, when a child is removed from their parents' care and placed in foster care, "[r]easonable efforts to reunify the child and family must be made" by DHHS in most cases. MCL 712A.19a(2). The court has an obligation to "determine whether the agency has made reasonable efforts" within 60 days of removal and at each permanency planning hearing. MCL 712A.19a(4); see also MCR 3.965(C)(4).

DHHS's reasonable efforts must include the development of a case service plan, which "includes services to be provided by and responsi-

bilities and obligations of the agency and activities, responsibilities, and obligations of the parent." MCL 712A.13a(1)(d). In cases that fall under the broad umbrella of "neglect," like this one, case service plans often include a series of obligations a parent must fulfill to earn reunification. Broadly speaking, services tend to fall into four categories: (1) improving material conditions, like housing and income, (2) attending and benefiting from classes, (3) mental and physical health care, and (4) attending supervised or unsupervised visits.

Court involvement often begins when a family is in crisis. For the respondent-mother, single-parenting a newborn and an 18-month-old, without stable housing, and while trying to finish school was a crisis. Her case treatment plan required her to rectify the conditions that led to court involvement: find housing, find a job, end an unhealthy romantic relationship. She did these things. And it was easy for the court to assess her success in these obligations objectively. When, for example, she obtained a Section 8 voucher and an affordable apartment, that unambiguously satisfied the instruction that she "find suitable housing."

But the obligations are not all easy to measure objectively. The respondent-mother did not just have to attend parenting and relationship classes. She had to *benefit* from them. But what does that mean? Asking a parent to participate in services is a reasonable request. But terminating the parent-child relationship on the sole basis of a failure to benefit from such services—as determined subjectively by a single caseworker—is unreasonable. Complicating these more subjective obligations further is the disconnect parents and caseworkers can have about "compliance." See Smith, *Child Welfare Service Plan Compliance: Perceptions of Parents and Caseworkers*, 89 Families in Soc'y 521 (2008). Caseworkers are more likely to correlate treatment plan compliance with a desire to parent, and any compliance "failure" with the absence of that desire. But many parents attribute their ability to comply with various external barriers, many of which—transportation, childcare, time off from work—are outside of their control. *Id*. at 528-529; upEND, *How We endUP: A Future Without Family Policing* (2021), p 8 ("Compliance is often impossible as families are asked to participate in services with no consideration to issues of accessibility, transportation, childcare, or job responsibilities."), available at <https://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf> (accessed November 1, 2022) [https://perma.cc/RR4D-USD4].

Raising a child is difficult, even when there is no crisis. The statutes governing termination proceedings require only "reasonable" efforts—not perfect efforts—from DHHS to reunify the family. And yet, we often require parents to meet each requirement with near perfection. Should any obligation in a court's order not be completed, a parent can lose their legal rights to their child.

In the respondent-mother's case, the trial court terminated her parental rights for two reasons: her ongoing efforts to manage her mental health and a decision to drive to court with a suspended license. The substantial progress the respondent-mother had made toward

rectifying the conditions that led to court involvement in her family didn't matter. And whether external factors, like poverty, contributed to her decision to drive to court without a valid license was not relevant either. The court seemed to want a perfect parent, not a reasonable parent.

IV. STATUTORY GROUNDS FOR TERMINATION

Before a court can terminate a parent's rights, it must find that statutory grounds for termination exist by clear and convincing evidence. MCL 712A.19b(3). These statutory grounds for termination, listed in MCL 712A.19b(3), include some specific provisions for cases of desertion, physical abuse, or sexual abuse, as well as more general provisions often cited in neglect cases. See MCL 712A.19b(3)(a) and (b).

Some grounds for termination are backward-looking, asking whether the conditions that led to court involvement have been resolved. For instance, a court can order termination where "conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time . . . ." MCL 712A.19b(3)(c)(*i*). Other grounds for termination are more forward-looking, asking whether the parent has shown an ability to "provide proper care and custody" for the child or whether there is a likelihood the child will be "harmed if he or she is returned to the home of the parent." MCL 712A.19b(3)(g) and (j).

The problem with this statutory framework is that it forces on courts a binary choice: full custody or full termination. It discourages creativity by courts and advocates in considering alternative arrangements for a family.

Take guardianship, for one example. See MCL 700.5205. Families can enter into a limited guardianship in which a parent "voluntarily consent[s] to the suspension of their parental rights," rather than full termination. MCL 700.5205(1)(b). The plan can include a provision for parenting time, which would allow for a parent to remain a meaningful part of a child's life. MCL 700.5205(2)(b). Once a court is deciding whether to terminate, such solutions are not on the table.

Nor does the statutory framework provide any guidance to courts about how far back to look in an assessment or how far into the future to project. As cases progress from initial disposition to final hearing, a parent's status at the final hearing date is all that matters—the arc of a parent's progress toward achieving challenging goals is not relevant. Sadly, this case illustrates this problem. From the point of court involvement to the final hearing, the respondent-mother made *immense* progress toward the goals laid out by DHHS in her agency treatment plan. She found housing, got a job, took classes, left a toxic relationship, found a therapist, and began taking her medication. But because she had not convinced the court that she was stable enough in these accomplishments on the day of the termination hearing, she lost the chance to continue improving.

The ambiguity within the statutory framework allows more harm. For example, the respondent-mother's parental rights were terminated because "[t]he conditions that led to adjudication continue to exist . . . ." MCL 712A.19b(3)(c)(*i*). But the statutory language places no limits on what "conditions" can be included in a petition seeking custody. And so, petitions can read as narratives of past mistakes, many of which cannot be translated into tasks through which a parent can prove progress. These conditions will inevitably "continue to exist."

Here again, the respondent-mother's experience illustrates this problem. In affirming the trial court's finding that past conditions continued to exist, the Court of Appeals relied in part on facts the respondent-mother could not possibly resolve to support its decision. For example, it cited the respondent-mother's initial choice to place GMD in an informal guardianship while she looked for housing. And it also cited the respondent-mother's own upbringing, concluding that she did not have a "personal foundation to apply to her own parenting." *In re GM Dixson*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2022 (Docket No. 358376), p 7. It said she had a "history of giving birth to children and relying on others to raise them when she could not cope." *Id*. To remedy these historical experiences, the respondent-mother would need a time machine. To terminate a parent's rights by labeling historical facts as "conditions" that "continue to exist" is illogical and unfair.

V. BEST INTERESTS

After a trial court finds statutory grounds exist to terminate a parent's rights by clear and convincing evidence, it must next determine whether termination is in the child's best interests by a preponderance of the evidence. MCL 712A.19b(5). Courts making this determination are encouraged to consider several factors such as " 'the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home.' " *In re White*, 303 Mich App 701, 713 (2014) (citation omitted). A court can look to the definition of "best interests" from the Child Custody Act for additional guidance, which includes factors like the love between parent and child, the parent's capacity for care, permanence, the health of the parents, and the reasonable preference of the child. MCL 722.23(3); *In re Medina*, 317 Mich App 219, 238 (2016). But neither the statutes, the court rules, nor the common law requires courts to consider the harm a child experiences when removed from their parents' care and placed in foster care.

And the best-interests standard is capacious, allowing for individual, subjective biases about parenting to drive decision-making. This isn't a new observation, which makes it all the more frustrating. In 1977, then Justice Brennan noted that the "best interests" standard's open-ended nature allowed "social workers of middle-class backgrounds, perhaps unconsciously, . . . to favor continued placement in foster care with a generally higher-status family" because of a "bias that treats the

natural parents' poverty and lifestyle as prejudicial to the best interests of the child." *Smith v Org of Foster Families for Equality and Reform*, 431 US 816, 834 (1977).

The standard has been consistently criticized since then for its "indeterminacy," which "invites the use of cognitive shortcuts" including "stereotypes and biases." Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S Cal Interdisc L J 298 (2009); see also *Lassiter v Dep't of Social Servs*, 452 US 18, 45 n 13 (1981) ("This Court more than once has adverted to the fact that the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.").

The best-interests standard does ask courts to assess a child's need for permanence and stability, a valuable data point. But when the context for that determination is rapid removal and lengthy disposition, this explicit emphasis on permanence will always put a thumb on the scale for termination. When a court removes a child and places them in foster care, they will adapt to that new normal. Because child welfare cases often unfold over the course of months (if not years), a decision to remove a child often predetermines that the child's stable and permanent placement *becomes* the foster placement. This is particularly true in cases in which the child is removed at a young age and spends a significant percentage of their life in a foster placement. In this way, termination becomes, unfortunately, more likely to be "in the child's best interest" from the moment of removal.

When determining whether termination of parental rights was in GMD's best interests, the court heard testimony about how disruptive the court case had been to GMD's life. She wondered when it would end, when she would have a stable sense of where she would live, and what her future looked like. In other words, she understandably longed for permanency and certainty. The termination-of-parental-rights framework creates an illusion that there are only two options: terminate and give the child permanence, or don't terminate and keep the child in limbo while the case remains pending.

As a result, the court didn't determine what stability meant for GMD. While it's true that she had always lived with the B Family, she had also always had visits with her mom. Stability for GMD *was* maintaining the status quo, with her mom's time-limited—but otherwise meaningful—involvement in her life. The failure to consider an arrangement for GMD that involved contact with her mom is particularly frustrating because the respondent-mother has such arrangements set up successfully with her other children.

VI. RACIAL DISPARITIES IN OUR CHILD WELFARE SYSTEM

Beyond problems with the way we adjudicate child welfare cases, our child welfare system is not equal-opportunity. The likelihood that a family will be involved with the child welfare system correlates directly with the child's race. Overrepresentation of minority children in the

child welfare system has been a well-documented problem for decades. For example, in 2020, although Black children represented only 14% of the total population of children in the United States, they represented 23% of children in foster care. *Racial Disproportionality*, 692 Annals Am Acad of Pol & Soc Sci at 253-254. The number of Hispanic children involved in the system is also disproportionate to their representation in the general population. For example, "[i]n 2016, Hispanics made up 17.6 percent of the national population, yet constituted twenty-one percent of the foster care population." *The Harm of Removal*, 43 NYU Rev L & Soc Change at 539. And, in 2007, "in many states, the percentage of Native American children in foster care was well over twice the percentage of Native American children in the general population." *Id*. at 539-540.

The disparities exist at every phase of child welfare adjudication. Minority children are more likely than white children to be reported as abused or neglected, more likely to be removed from their parents' care, and less likely to be reunited with their parents at the end of a case. *Racial Disproportionality*, 692 Annals Am Acad Pol & Soc Sci at 253-254.

Researchers who study racial disproportionality in the child welfare system see many contributing factors. Minority children and families are more likely to experience poverty, which is often viewed as neglect. *Id*. at 257. As discussed above, the legal framework governing child welfare cases is full of open-ended, hard-to-apply standards that invite subjectivity and bias. Minority families may experience "cultural misunderstandings" from courts and advocates who equate parenting practices different from their own as neglectful or wrong. *Id*. at 265.

VII. SOLUTIONS

There is good news: there are many concrete actions we can take to improve how our legal system treats our families. Some of these changes are small, some less so. All are achievable without making any drastic changes to our laws.

Parents who come into contact with the child welfare system should have legal representation from start to finish. See Sankaran, *With Child Welfare, Racism is Hiding in the Discretion*, The Imprint (June 21, 2020). Courts and the advocates who work within them should always prioritize family placements over nonfamily placements, even where there might be added hurdles on the front end, like the completion of the foster parent certification process. Even when family placements are unavailable, fictive kinship placement with friends or neighbors should be prioritized to minimize disruption.

While a parent's involvement with the court may stem from a moment of crisis or a bad decision, most parents have an immense capacity to grow and parent their children if supported. This makes the adversarial model a bad fit for child welfare cases. If advocates could see their role as finding the best solution for a whole family, not as an adversary to a parent or child, we might grow solutions. And prioritizing treating families with compassion in each interaction allows advocates to identify better solutions to problems. See Markey & Sankaran,

Compassion: The Necessary Foundation to Reunify Families Involved in the Foster Care System, 58 Fam Cts Rev 908 (2020).

Racial disproportionality in child welfare dockets should be addressed transparently. Making equity an established, agency-wide goal of leadership helps. *Racial Disproportionality*, 692 Annals Am Acad Pol & Soc Sci at 266. And by trying to understand families more holistically, advocates can also reduce the likelihood that their own subjective biases will fill gaps in a family's story and lead to false conclusions that cultural differences are neglectful, harmful, and wrong.

Changes to the legal framework governing termination would help too. We could require courts to consider the harm of removal and select the least-disruptive placement for a child. In Washington, D.C., the local court rules require courts to " 'evaluate the harm to the child that may result from removal' " before removing a child from their parents. *The Harm of Removal*, 43 NYU Rev L & Soc Change at 567 (citation omitted). The court must consider the " 'child's attitude toward removal and ties to the parent,' " their " 'relationships with other members of the household,' " and the " 'disruption to the child's schooling and social relationships' " that removal might cause. *Id*. (citation omitted). Since implementing this court rule, Washington, D.C., has had one of the largest decreases in children entering foster care in the country. *Id*.

Along with expressly requiring courts to evaluate the harm of removal, our legal framework could also integrate the limited-guardianship process into the termination-of-parental-rights adjudication, requiring courts to take a final look at less-restrictive arrangements before full termination. Such a change would recognize that for many children, maintaining a connection to siblings, relatives, and even their neighborhood is immensely important for their mental and physical well-being. There are many creative solutions to keep children connected to their family and place of origin that don't require a parent to have full custody.

One of the most effective ways to solve the problems of our child welfare system is to reduce the need for it. The more we move solutions upstream, the less we will need downstream interventions. A shift in priorities from punishing families on the back end to supporting families on the front end is needed. Because we already know which factors in a parent's life might lead that parent to neglect or abuse their children, we can prevent many of them. There is a clear link between poverty and child neglect. In some cases, this is because "child neglect" and "poverty" are conflated: neglect is a stand-in for an inability to provide basic needs like food, shelter, medical care. *How We endUP* at 7. Any program aimed at reducing poverty will reduce the need to get courts and lawyers involved in families' lives. See Sankaran & Church, *Rethinking Foster Care: Why Our Current Approach to Child Welfare Has Failed*, 73 SMU L Rev F 123, 137 (2020).

Programs designed to aid poor families, like supportive housing programs and Head Start, have been shown to reduce a child's likelihood of ending up in foster care. *Id*. Giving parents the resources they need to provide for their children directly, rather than removing children from their family home, would go a long way to resolving the real issue

of child poverty without the added trauma of separation. There is recent empirical evidence about this strategy from the COVID-19 pandemic: the annual child tax credit provided to families under the American Rescue Plan. See Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World* (New York: Basic Books, 2022), p 299.

There are, of course, cases of neglect or abuse where children should not remain with their parents. But when a child welfare system spends too much time investigating, monitoring, and adjudicating families that do not require court intervention, these serious cases can slip through the cracks. A study of Texas's child welfare system found that while Texas has one of the highest rates of child removal in the country, it also had one of the highest rates of child fatality. *Torn Apart*, p 287. The study concluded that " 'the statistical analysis shows no relationship between a state's intervention with a family, as measured by its reporting rate, service rate, or removal rate, and its child abuse and neglect death rate.' " *Id*. Front-end support for families would allow child-protection professionals to focus time and resources on children who truly need direct involvement from the state to be safe.

After nearly six years of court involvement, GMD ended up where the respondent-mother had placed her at the start: in the home of her family friends, the B Family. But now, with her rights terminated, the respondent-mother may or may not see GMD. How would this case have turned out if, rather than admonishing the respondent-mother for failing to secure a legal guardianship (a process that's confusing and not common knowledge to every new parent who might call on friends and family to help), the court had simply helped her set one up? What if the respondent-mother had received a Section 8 voucher before court involvement? What if she had had access to affordable childcare for GMD while she was in school? What if mental health services were affordable and easy to access?

Because I believe termination was unnecessary for this family, I respectfully dissent from the Court's denial of leave to appeal.

Leave to Appeal Denied November 18, 2022:

MCKENZIE v DEPARTMENT OF CORRECTIONS and OLDEN v DEPARTMENT OF CORRECTIONS; No. 161690 and 161691; Court of Appeals No. 347061 and 347798.

VIVIANO, J. (*dissenting*). Plaintiffs have brought federal claims against state agencies and officials—claims that, until now, have always been heard in federal court. But today this Court leaves in place a decision by the Court of Appeals opening the circuit court doors to these claims. This resolution rests on an incorrect interpretation of the Court of Claims (COC) Act, particularly MCL 600.6440, and disregards the relationship between sovereign immunity and jurisdiction. A proper view of our statutes and caselaw would require these claims to be brought in federal court. Contrary to plaintiffs' contentions, that outcome would not violate the Supremacy Clause or the Tenth Amendment:

federal law at issue would remain supreme and could be enforced in federal courts. That is the system that has long governed in this state for these types of claims. By failing to reverse the Court of Appeals' erroneous conclusion, the majority leaves in place a flawed opinion that subtly erodes our state's ability to determine the types of cases its courts will hear. I dissent.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs in these two cases sued the Michigan Department of Corrections (MDOC) and the warden of the Macomb Correctional Facility in Wayne Circuit Court. They alleged various claims, the relevant ones here being that the warden discriminated against them in violation of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., on the basis of their allergies to the dogs used in the prison and that the MDOC and the state of Michigan violated the Rehabilitation Act, 29 USC 701 *et seq*., by failing to provide reasonable accommodations for their allergies. The dogs were assigned to particular housing units, and plaintiffs, who worked in those units, requested a transfer to units without dogs. The warden initially honored this request but eventually returned plaintiffs to their original units.[1]

Defendants moved for summary disposition under MCR 2.116(C)(4), asserting that the circuit court lacked subject-matter jurisdiction over claims arising under federal law that could be remedied in federal courts. In particular, they noted that MCL 600.6419 gives the COC jurisdiction over suits against the state, but MCL 600.6440 exempts claims for which an adequate remedy is available in federal court. Accordingly, defendants argued that the exemption in MCL 600.6440 means that no Michigan court has subject-matter jurisdiction over federal-law claims against the state that are remediable in federal courts.

The trial court denied the motions, and the Court of Appeals affirmed in a published opinion. The Court of Appeals held that "[w]hile MCL 600.6440 precludes the filing of a claim in the Court of Claims if an adequate remedy exists, it does not explicitly preclude the concurrent jurisdiction of the circuit courts over such claims. . . . Divesting the Court of Claims of jurisdiction does not divest the circuit court of any jurisdiction it may already have." *McKenzie v Dep't of Corrections*, 332 Mich App 289, 307 (2020). The Court of Appeals also noted the general presumption that our state courts have concurrent jurisdiction with federal courts over federal claims.

Defendants then sought leave to appeal here. After receiving supplemental briefing, we ordered argument on the application for leave, focusing on "(1) whether MCL 600.6440 divests the Court of Claims of

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[1] Plaintiffs filed claims with the Equal Employment Opportunity Commission (EEOC). The EEOC found probable cause to believe that the MDOC had violated the ADA, but federal officials declined to pursue claims on plaintiffs' behalf.

jurisdiction over both of the appellees' causes of action arising under federal statute; and (2) if so, whether the circuit court shares concurrent jurisdiction with the federal courts over those causes of action." *McKenzie v Dep't of Corrections*, 508 Mich 943, 943-944 (2021).

II. ANALYSIS

The overriding question in these cases is whether the circuit court can exercise jurisdiction over the present claims. Both the text of the COC Act and the historical treatment of such claims plainly demonstrate that the circuit court lacks jurisdiction. This conclusion raises no Supremacy Clause concerns.

A. SOVEREIGN IMMUNITY

To understand the meaning of the COC Act, its historical background must be examined. The traditional rule across the common-law world, including Michigan, is that "the 'sovereign' was immune from suit unless he consented to the action." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 597 (1984). Thus, "[f]rom statehood forward, Michigan jurisprudence recognized that the sovereign (the state) was immune from *all* suits, including suits for tortious injuries which it had caused." *Id*. at 598. The rationale was not that "the state could do no wrong," but that the state had created the courts and therefore "was not subject to them or their jurisdiction." *Id*. As with many areas of law in the nineteenth century—such as divorces or corporate charters—the Legislature worked piecemeal, consenting to suits on an individual basis. *Id*. This proved infeasible, and in 1842 the state created a Board of State Auditors to decide whether to consent to suit; in the 1920s, this function transferred to the State Administrative Board, which could settle and pay claims. *Id*. at 599. The types of claims subject to the State Administrative Board's authority were those "arising from or by reason of negligence, malfeasance or misfeasance of any state officer, employe, commission, department, board, institution, or other governmental division . . . ." 1929 PA 259, § 1.

The state's sovereign immunity remained despite the grant of general jurisdiction to circuit courts in the 1850 Constitution.[2] The current Constitution states, "The circuit court shall have original jurisdiction in all matters not prohibited by law[.]" Const 1963, art 6, § 13. The statute setting out the circuit court's civil jurisdiction similarly states, "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is

[2] Const 1850, art 6, § 8 (as amended) stated, "The circuit court shall have original jurisdiction in all matters civil and criminal, not excepted in this constitution, and not prohibited by law[.]"

given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605.

After creation of the circuit courts in the 1850 Constitution, we continued to explain that "[t]he State has never, before or since, allowed itself to be sued in its own courts, and no officer could lawfully subject it to suit." *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 427 (1880). We reiterated this conclusion in *Greenfield Constr Co, Inc v Dep't of State Hwys*, 402 Mich 172 (1978), stating:

> To the foregoing emphasized exceptions [to circuit court jurisdiction] this Court has earlier and repeatedly added those cases in which the defendant is by its sovereignty suit-immune.
>
> Thus it is well settled that the circuit court is without jurisdiction to entertain an action against the State of Michigan unless that jurisdiction shall have been acquired by legislative consent. [*Id*. at 194 (citations omitted).][3]

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[3] Our cases distinguish "sovereign immunity from *suit* and sovereign immunity from *liability*." *Id*. at 193. "Legislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court." *Id*. "By waiving its immunity from liability, however, the state concedes responsibility for wrongs attributable to it and accepts liability in favor of a claimant. In so doing it may even create a cause of action in favor of the claimant which did not theretofore exist." *Id*. The present matter does not involve immunity from liability, which now generally is dealt with by the governmental tort liability act, MCL 691.1401 *et seq*.

B. THE COC ACT

Greenfield was decided after the enactment of the COC Act, which was first passed in 1939. While the act did not specifically state that sovereign immunity had been waived, that was its clear effect: "By creating a court with jurisdiction over the state, the Legislature destroyed the theoretical basis for sovereign immunity. There was now an entity with power to hear cases against the state, and individual consent to suit was no longer required." *Ross*, 420 Mich at 600; see generally *Quality Tooling, Inc v United States*, 47 F3d 1569, 1575 (CA Fed, 1995) ("Just as a statute or contract that creates a right to monetary relief need not contain a redundant waiver of sovereign immunity, a Congressional enactment granting a federal court jurisdiction over a class of cases need not redundantly waive the government's sovereign immunity if it is otherwise waived."). The core provision, MCL 600.6419(1), provides the COC with jurisdiction over certain cases:

> Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. The state administrative board is vested with discretionary authority upon the advice of the attorney general to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. Except as otherwise provided in this section, the court has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

The exceptions noted in § 6419(1) deal with two separate circumstances. The first, § 6421, is for jury trials. It provides:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue. [MCL 600.6421(1).]

Trials in the COC are "heard by the judge without a jury." MCL 600.6443. Thus, if a jury by trial is properly invoked, the case can be heard in a different court. The second exception—the main exception at issue here—is § 6440, which states:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof. [MCL 600.6440.]

1. TEXTUAL ANALYSIS

The core question in the present matter is whether an action that falls within the exception in § 6440 must go to federal court or alternatively can go to circuit court. Plaintiffs' argument in favor of circuit court jurisdiction proceeds from the observation that § 6440 does not directly and expressly require the claim to go to federal court. Moreover, so the argument goes, § 6440 is simply an exception to the COC's exclusive jurisdiction under § 6419(1), meaning that it deprives the COC of exclusive jurisdiction. And without exclusive jurisdiction vested in some other court (like the COC), the circuit court can exercise jurisdiction over the claim under MCL 600.605, which gives the circuit court jurisdiction unless (among other things) "exclusive jurisdiction is given in the constitution or by statute to some other court . . . ." Therefore, plaintiffs conclude that because the COC's jurisdiction is not exclusive, the circuit court enjoys jurisdiction.

This argument is wrong. The text of MCL 600.6440 is clear that claims falling within its terms must go to federal court. As noted, that section states, in relevant part: "No claimant may be permitted to file claim in [the COC] against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts . . . ." Imagine that parents give their 16-year-old child the chore of picking up groceries at Meijer. But they instruct her not to go to Meijer if there is a sale on groceries at Whole Foods. The child will no doubt be in trouble if, upon learning there is a sale at Whole Foods, she goes to Costco instead. The implication in the parents' directive is that the exception to the general directive to go to Meijer (i.e., the COC's exclusive jurisdiction) exists because of the sale at a particular store, Whole Foods (i.e., the adequacy of federal court remedies); therefore, if the exception applies the child must go there.[4] Thus, § 6440 does not send cases to circuit court or even create an indirect way for them to get there.

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[4] The fact that this is implied rather than express follows from normal semantic principles. Participants in communication generally seek to

The relevant context supports this view. The most compelling evidence is the statute of limitations. It states, "Every claim against this state, cognizable by the court of claims, is forever barred unless the claim is filed with the clerk of the court or an action is commenced on the claim in federal court as authorized in section 6440, within 3 years after the claim first accrues." MCL 600.6452(1). This section indicates that the statute authorizes suit only in federal court—if it had authorized suit in the circuit court, this section no doubt would have mentioned it.

And when the Legislature wanted the circuit court to retain or assume jurisdiction over a case that otherwise might fall to the COC, it said so expressly. In MCL 600.6421, for example, the Legislature explicitly gave the circuit court (or district or probate courts) jurisdiction over cases in which a proper jury demand had been made. In § 6419(4) through (6), the Legislature ensured that the circuit court's jurisdiction over certain categories of cases remained unaffected by the COC Act.[5] In

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avoid being " 'overinformative' because 'overinformativeness may be confusing in that it is liable to raise side issues; and there may also be an indirect effect, in that the hearers may be misled as a result of thinking that there is some particular POINT in the provision of the excess of information.' " *People v Mathews*, 505 Mich 1114, 1121 n 9 (2020) (VIVIANO, J., dissenting), quoting Grice, *Logic and Conversation*, in 3 *Syntax and Semantics: Speech Acts* (New York: Academic Press, 1975), p 46. "Thus, for example, the statement 'Jane has two children' does not implicate that Jane has more than two children, even though the statement would remain true if she had a third child." *Mathews*, 505 Mich at 1121 n 9, quoting Kaplan, *Linguistics and Law* (New York: Routledge, Taylor & Francis Group, 2020), p 7. In the same way, the Legislature might have thought that adding an express requirement in § 6440 that the case be filed only in federal court would be overinformative and unnecessary. Indeed, it might not have occurred to the Legislature that there was another alternative in the state—the circuit court—because these types of federal claims had *never gone there before*.

[5] Section 6419(4) states:

> This chapter does not deprive the circuit court of this state of jurisdiction over actions brought by the taxpayer under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, upon the circuit court, or proceedings to review findings as provided in the Michigan employment security act, 1936 (Ex Sess) PA 1, MCL 421.1 to 421.75, or any other similar tax or employment security proceedings expressly authorized by the statutes of this state.

Section 6419(5) states:

> This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law.

other statutes allowing claims against the state to be brought in circuit court, the authorization was explicit.[6]

Properly read, then, the COC Act does not demonstrate a legislative intent that cases falling within § 6440 can be filed in the circuit court—instead the act indicates that such cases must be filed in federal court. This is enough, in my view, to demonstrate that the circuit court lacks jurisdiction here and that the case must proceed, if at all, in federal court. While the language in MCL 600.605 might be read to cover these cases, this would be an anomalous result. Cases against the state have never—except where expressly authorized—gone to circuit court. Moreover, even if there were a conflict between the COC Act and MCL 600.605, the COC Act contains the more specific provisions on claims against the state and therefore would control over the language in MCL 600.605, giving the circuit court general jurisdiction. See *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 350 (2020). Thus, I do not believe that the COC Act authorizes these claims to go to circuit court.

2. JURISDICTION AND SOVEREIGN IMMUNITY

This conclusion is further confirmed by the doctrinal relationship between jurisdiction and sovereign immunity. Without a waiver of sovereign immunity for claims brought in the circuit court, that court lacks jurisdiction to hear those claims. And waivers are generally court-specific. Neither § 6440 nor anything else in the COC Act effects a broad-based waiver of sovereign immunity necessary for the claims to be

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Finally, § 6419(6) states:

> This chapter does not deprive the circuit court of exclusive jurisdiction to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963.

[6] For example, the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., defines "person" to include "the state or a political subdivision of the state or an agency of the state . . . ." MCL 37.2103(g). It then defines an "employer" as "a person who has 1 or more employees . . . ." MCL 37.2201(a). Various obligations are placed on employers (i.e., "persons," which includes the state) and other persons in employment and public accommodations. MCL 37.2202; MCL 37.2302. Suits brought for violations of the statute "may be brought in the circuit court . . . ." MCL 37.2801(2). Cf. *Does 11-18 v Dep't of Corrections*, 323 Mich App 479, 490 (2018) (noting our caselaw stating that ELCRA waives governmental immunity). Similarly, under the Whistleblower Protection Act (WPA), 15.361 *et seq*., "employer" is defined to include "the state or a political subdivision of the state," MCL 15.361(b). Actions under the WPA go to circuit court. MCL 15.363(2).

brought in any state court other than the COC. This is not simply or even predominantly because waivers of sovereign immunity are supposed to be "strictly" construed. *Greenfield*, 402 Mich at 197. Rather, like any other text, these waivers should be interpreted according to their terms. No one has identified any statutory language that would endow the circuit court with the ability to hear these claims. Critically, nothing in the COC Act suggests that sovereign immunity had been eliminated for these types of claims in *every* court in Michigan or even in any court other than the COC.

As noted above, after citing the jurisdictional provisions in Const 1963, art 6, § 13 and MCL 600.605 in *Greenfield*, 402 Mich at 194, we stated that "it is well settled that the circuit court is without jurisdiction to entertain an action against the State of Michigan unless that jurisdiction shall have been acquired by legislative consent." While *Greenfield* does not explain the link between sovereign immunity and jurisdiction, the cases it relied on do. In *Manion v State Hwy Comm'r*, 303 Mich 1 (1942), we stated:

> The terms of the State's consent to be sued in any court define that court's jurisdiction to entertain the suit. *United States* [*v Sherwood*, 312 US 584 (1941)]. The "court of claims" is a legislative and not a constitutional court and derives its powers only from the act of the legislature and subject to the limitations therein imposed. [*Manion*, 303 Mich at 20.][7]

In *Sherwood*, the Supreme Court examined the Tucker Act, which authorizes and regulates suits against the federal government. The section at issue involved the authorization for a district court to hear certain cases that would otherwise go to the federal court of claims—in these cases, the district court's jurisdiction was concurrent with that of the federal court of claims. *Sherwood*, 312 US at 590.[8] The suit brought in *Sherwood* was not one that could have been brought in the federal court of claims, and the question was whether the provision allowing

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[7] Another case cited by *Greenfield* connected sovereign immunity and jurisdiction (albeit somewhat less directly) by reasoning that a court loses jurisdiction when the Legislature repeals an act giving consent to be sued. *McDowell v Fuller*, 169 Mich 332, 336-337 (1912).

[8] The Court explained the statutory framework as follows: "Section 2, authorizing suits against the Government in district courts, is an integral part of the statute, other sections of which revised and enlarged the classes of claims against the United States which could be litigated in the Court of Claims. It was the jurisdiction thus defined and established for that court which was extended by the section to the district courts in the specified instances, for in consenting to suits against the Government in the district courts, Congress prescribed that the jurisdiction thus conferred should be 'concurrent' with that of the Court of Claims." *Id*.

suits in the district court with the government's consent somehow gave that court greater jurisdiction than would be wielded by the federal court of claims. Answering in the negative, the Court stated:

> Construing the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity, and in the light of the history of the Court of Claims' jurisdiction to which we have referred, we think that the Tucker Act did no more than authorize the District Court to sit as a court of claims and that the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims. The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. [*Id*. at 590-591 (citations omitted).]

This paragraph demonstrates two points. First, it shows that waivers of sovereign immunity are jurisdictional—without a waiver, the court has no power to hear the case. See also *United States v Mitchell*, 463 US 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). Second, it indicates the commonsense notion that the terms of the waiver must be complied with, such that the waiver cannot extend beyond the conditions established by the Legislature.[9]

Despite its relationship to jurisdiction, the concept of sovereign immunity has some independent significance. It is not the case that a grant of jurisdiction necessarily means a waiver of sovereign immunity or vice versa. As such, even when jurisdiction has generally been granted, sovereign immunity must still be waived. As Wright and Miller explain, "A statute waiving the Government's immunity to suit does not always confer jurisdiction upon the federal courts, but sometimes it does. Likewise, a statute conferring jurisdiction upon the federal courts

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[9] It appears that federal courts generally consider the jurisdictional aspect of these waivers to refer to subject-matter jurisdiction. Wright and Miller note that "generally the Court [i.e., the United States Supreme Court] has attached jurisdictional consequences to sovereign immunity and to the Government's waiver of the defense." 14 Federal Practice & Procedure (4th ed), Jurisdiction, § 3654. Continuing, they state: "[C]onsidered as a 'prerequisite for jurisdiction,' the absence of consent by the United States to suit has been treated by courts as a fundamental defect that deprives the district court of subject matter jurisdiction. That principle has been applied in numerous cases . . . ." *Id*. (collecting cases and noting, however, that in some of these cases "jurisdiction has been conflated with a substantive element of the claim or a procedural condition").

does not always waive the Government's immunity to suit, but sometimes it does." 14 Federal Practice & Procedure (4th ed), Jurisdiction, § 3654 (collecting cases; citations omitted).

In *Blatchford v Native Village of Noatak*, 501 US 775 (1991), the Court explained why this is so. There, the Court examined 28 USC 1362, which provides a general grant of jurisdiction over federal-question claims brought by Indian tribes or bands. The Court held that this statute did not abrogate state sovereign immunity, which can only occur with "unmistakably clear" language from Congress. *Id*. at 786 (quotation marks and citation omitted). The Court's reasoning is equally applicable: "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id*. at 788 n 4.[10] The Supreme Court and the lower federal courts have applied this general rule to claims against the United States brought in federal court.[11]

Under this same logic, I do not see how MCL 600.605 (or Const 1963, art 6, § 13) could operate as a waiver of sovereign immunity that would allow the state to be sued in circuit court for cases within MCL 600.6440. There is nothing in the COC Act that waives sovereign immunity for claims brought in circuit court. The only argument for finding a waiver would be if the waiver for suits brought in the COC operated as a waiver for suits brought in circuit court.

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[10] See also *Quality Tooling*, 47 F3d at 1575 ("The Government's waiver of sovereign immunity is not only distinct from, it is logically prior to, the Government's grant of jurisdiction. . . . In order for a claim against the United States to be heard, first there must be, because sovereign immunity requires it, consent to be sued; and because, with the exception of the Supreme Court, the subject matter jurisdiction of a federal court is defined by statute, there must be, second, Congressional provision of a court with the authority to hear the claim and grant relief.").

[11] See *United States v Mitchell*, 445 US 535, 538 (1980) ("The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act, 28 U.S.C. § 1491, which gives that court jurisdiction of 'any claim against the United States founded either upon the Constitution, or any Act of Congress.' The Tucker Act is 'only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.' The Act merely 'confers jurisdiction upon [the Court of Claims] whenever the substantive right exists.' The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims.") (citations omitted); see also *Munaco v United States*, 522 F3d 651, 653 n 3 (CA 6, 2008) ("[J]urisdictional statutes, such as the statute giving federal district courts original jurisdiction of civil actions arising under [the] Constitution, laws, or treaties of [the] United States, do not operate as waivers of sovereign immunity.").

This argument depends, however, on the proposition that a waiver for one court somehow operates as a waiver in another not mentioned in the statute. The caselaw rejects this argument: waivers are court-specific, unless their terms dictate otherwise. In *United States v Shaw*, 309 US 495 (1940), the United States had obtained a judgment against the administrator of a decedent whose estate was in our probate court. The United States filed its claim on the judgment in a Michigan probate court, against which the administrator tried to set off another claim also filed in that court. After the court allowed the claim of the United States but denied the setoff, we reversed the decision on the setoff. Back before the probate court, the result of the setoff was that the United States owed a little over $23,000 to the estate, for which the administrator obtained a judgment (that we affirmed on appeal). *Id*. at 498.

The question on certiorari before the Court was "whether the United States by filing a claim against an estate in a state court subjects itself, in accordance with local statutory practice, to a binding, though not immediately enforceable, ascertainment and allowance by the state court of a cross-claim against itself." *Id*. at 499. In laying out the general principles, the Court stated:

> Whether that jurisdiction exists depends upon the effect of the voluntary submission to the Michigan court by the United States of its claim against the estate. As a foundation for the examination of that question we may lay the postulate that without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction. *Even when suits are authorized they must be brought only in designated courts*. The reasons for this immunity are imbedded in our legal philosophy. [*Id*. at 500-501 (citations omitted; emphasis added).]

The relevant statutes provided that when the government voluntarily sued, cross-claims could be filed against it up to the amount of the government's claim. *Id*. at 501. Thus, the Court held that the Michigan courts had no authority to exceed the amount of the government's claim. The reasoning was that the Court had no "right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress." *Id*. at 502.[12]

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[12] The mention of the "designated courts" is important to the case. Claims against the government for an amount greater than the setoff would have to be made in the Court of Federal Claims. See generally *Quality Tooling, Inc*, 47 F3d at 1582-1583 (Schall, J., dissenting) (noting that the Court of Federal Claims had exclusive jurisdiction over claims exceeding a certain dollar amount). Thus, the waiver was keyed to different courts based on the dollar amount at issue. Put differently, the waiver for one court did not function as a waiver for another court.

Shaw relied on another case for the proposition that waivers were court-specific: *Minnesota v United States*, 305 US 382 (1939). In that case, Minnesota sued the United States and others in state court to condemn part of Indian lands for a highway. The parties agreed to remove the case to federal court, where counsel for the United States moved to dismiss because it had never consented to be a party. *Id*. at 384. The relevant statute allowed the Secretary of the Interior to authorize the alienation of land to a state for purposes of building a highway; but there had been no such authorization in that case or any other consent to be sued. The Court held that an authorization to condemn land might imply permission to sue the United States. This did not matter, however, because the authorization (i.e., the waiver) applied only in federal courts, and the case under consideration began in state court: "Congress has provided generally for suits against the United States in the federal courts. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought." *Id*. at 388. The government officer's removal of the case to federal court did not rectify this issue, as officers could not grant jurisdiction. *Id*. at 388-389. Therefore, "[i]f Congress did not grant permission to bring this condemnation proceeding in a state court, the federal court was without jurisdiction upon its removal." *Id*. at 389. In other words, the waiver for suits in the federal district court did not extend to suits in state courts.[13]

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[13] The lower federal courts have relied on these cases for the proposition that waivers are court-specific. The United States Court of Appeals for the Ninth Circuit cited and discussed them when rejecting the argument that "the Tucker Act generally waives sovereign immunity for suits outside the Court of Federal Claims." *McGuire v United States*, 550 F3d 903, 912 (CA 9, 2008). This was because the Tucker Act gave the Court of Federal Claims jurisdiction over the claims and not other courts. *Id*. at 913 ("There is nothing unusual about our conclusion that the Tucker Act effects a limited waiver of sovereign immunity in the Court of Federal Claims. In other contexts, the Supreme Court has recognized that a waiver of sovereign immunity can be forum-specific: '[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.' ") (citation omitted). As *McGuire* noted, one court had attempted to distinguish *Minnesota* and *Shaw* on the ground that both of those cases involved cross-sovereign courts, i.e., the court without jurisdiction (due to the lack of waiver) was a state court rather than another federal court. *McGuire*, 550 F3d at 914, citing *Quality Tooling*, 47 F3d at 1577 & n 9. Consequently, in *Quality Tooling*, the court decided that the waiver of sovereign immunity in one federal court with jurisdiction operated to waive immunity in another federal court that could exercise jurisdiction. *Quality Tooling*, 47 F3d at 1577. But neither the dissent in *Quality Tooling* nor the Ninth Circuit in *McGuire* was convinced, and I

C. APPLICATION

In light of this analysis, I believe it is clear that circuit courts lack jurisdiction over the present claims. The plain text of neither the COC Act, MCL 600.605, nor Const 1963, art 6, § 13 shows any intent to waive sovereign immunity for cases that meet the requirements of MCL 600.6440 and are filed in circuit court. I therefore cannot see how the circuit court can exercise jurisdiction here. This is true even though Michigan might have waived sovereign immunity at least for the Rehabilitation Act claim. Under the above analysis—and by explicit terms of the federal statute—Michigan's waiver is limited to suits brought in federal court. 42 USC 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States *from suit in Federal court* for a violation of section 504 of the Rehabilitation Act of 1973 . . . by recipients of Federal financial assistance.") (emphasis added).

The ADA claim seeking injunctive relief is a bit trickier. Under *Ex parte Young*, 209 US 123 (1908), "[t]he Eleventh Amendment does not preclude suits against state officers for injunctive relief, even when the remedy will enjoin the implementation of an official state policy," Chemerinsky, Federal Jurisdiction (7th ed), § 7.5.1, p 459. This clearly applies to plaintiffs' claim against the warden for injunctive relief under the ADA.

However, the question is whether this rule requires that the state provide a forum to allow these suits. In *Alden v Maine*, 527 US 706, 747 (1999), the Court observed that *General Oil Co v Crain*, 209 US 211 (1908)—decided the same day as *Ex parte Young*—"extend[ed] the rule of that case [i.e., *Young*] to state-court suits[.]" The Court stated, "Had we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine." *Id*. at 748. In *Crain*, as in *Ex parte Young*, one of the key rationales was that if the officer's action "comes into conflict with the superior authority of that Constitution [i.e., the federal Constitution], . . . he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Young*, 209 US at 159-160; see also *Crain*, 209 US at 226 (noting similar argument).

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think they have the better argument. Nothing in *Shaw* or *Minnesota* turned on the fact that the other court was a state court. The United States Supreme Court did not suggest it was attempting to protect the sovereignty or authority of federal courts vis-à-vis is the state courts.

But neither *Young* nor *Crain* addressed whether states are required to provide a state-court forum for *Ex parte Young* suits.[14] The holding in *Crain*, 209 US at 228, appears narrower: "It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court." This language merely indicates that the issue is reviewable, not that the state court must afford a forum for hearing the claim. Moreover, the Court's phrasing is important. Michigan's sovereign immunity in its own courts has emanated from this state's common law, not the Eleventh Amendment, and thus it is not at all clear that the Court meant to suggest that because the Eleventh Amendment is inapplicable, states also lack sovereign immunity in their courts. See generally *Northern Ins Co of New York v Chatham Co, Ga*, 547 US 189, 193-194 (2006) (" '[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.' ") (citation omitted); *McNair v State Hwy Dep't*, 305 Mich 181, 187 (1943) (" 'The doctrine of sovereign immunity has long been firmly established in the common law of this State . . . .' ") (citation omitted).

For these reasons, I do not believe that the circuit courts have jurisdiction or are otherwise required to entertain the present claims.[15]

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[14] A few other state supreme courts have held that *Ex parte Young* applies in state courts, but again they did not analyze whether the federal Constitution (as interpreted by Supreme Court caselaw) *mandated* that state courts hear these cases. See *Lee v State*, 844 NW2d 668, 677 (Iowa, 2014) (holding that " *Ex parte Young* applies to state-court suits"); *Gill v Pub Employees Retirement Bd of Pub Employees Retirement Ass'n*, 135 NM 472, 481 (2004) ("*Alden* confirms that *Ex parte Young* also applies in state courts.").

[15] We ordered supplemental briefing on an issue not raised by the parties: § 6419(1)(a) grants the COC exclusive jurisdiction over claims against the "state," its "departments," and "officers," but the exception in § 6440 applies only to the state and departments, commissions, boards, institutions, and arms or agencies—it does not mention officers. The parties agree that, for various reasons, the exception in § 6440 nonetheless applies to officers. I believe that they are correct. It is well settled in similar areas of the law that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v Mich Dep't of State Police*, 491 US 58, 71 (1989) (citation omitted). Further, " 'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' " *Regents of the Univ of Cal v Doe*, 519 US 425, 429 (1997) (citation omitted). We

D. THE SUPREMACY CLAUSE

The next question is whether the above interpretation would result in a violation of the Supremacy Clause.[16] While this could be considered a standalone constitutional issue, it also bears upon the interpretation of the COC Act under the constitutional-doubt canon: we seek to avoid rendering interpretations of statutes that raise grave doubts about the statutes' constitutionality. See *In re Certified Questions From the US Dist Court, Western Dist of Mich*, 506 Mich 332, 409 (2020) (VIVIANO, J., concurring in part).

There are no such concerns raised by the interpretation above. As an initial matter, it seems plain that the interpretation does not violate the text of the Supremacy Clause. A state's failure to provide a forum to adjudicate federal causes of action against the state does not render federal law less supreme. The federal law remains binding over any contrary state law. And, as seen above, the federal law at issue here does not purport to require states to create a forum for adjudication of these

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have, in fact, applied this reasoning when addressing a claim against a state prison warden. In *McDowell v Warden of Mich Reformatory at Ionia*, 169 Mich 332, 336-337 (1912), the plaintiff sued such a person and argued that the action was not against the sovereign state, which was not named as a defendant. We held that because the claim was against the warden in his official capacity and touched upon the warden's action (negotiating and terminating a contract) on behalf of the state, the action was against the state. *Id*. at 336. We stated: "While the contract purports to be the contract of the warden, and he is the nominal party defendant, it was in truth a contract with and for this State, negotiated by and through him as its agent, thus making this action intrinsically against the State of Michigan." *Id*. We have elsewhere said that "courts will look through and beyond the nominal parties to determine the real parties in interest, that where a State officer is sued in relation to official acts it is a suit against the State, and that the State may not be sued without its consent . . . ." *Longstreet v Mecosta Co*, 228 Mich 542, 548 (1924), citing *McDowell*, 169 Mich 332. Under this reasoning, I believe that the suit against defendant warden in his official capacity (for acts taken on behalf of the state in operating the prison) represents a suit against the state that falls within the terms of § 6440.

[16] The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [US Const, art VI.]

claims—consequently, my interpretation of federal law does not elevate state statutes above the requirements of federal statutes.

Moreover, the only time the United States Supreme Court has actually opined on the precise question at hand came in *Alden*, where it raised structural arguments in concluding that Congress could not subject nonconsenting states to private suits in their own courts. *Alden*, 527 US at 749. This was because "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself." *Id*., citing *Nevada v Hall*, 440 US 410 (1979), overruled on other grounds by *Franchise Tax Bd of Cal v Hyatt*, 587 US 230 (2019). *Alden* further observed the possibility that allowing such suits would violate the anticommandeering doctrine developed under the Tenth Amendment. Under that doctrine, the Supreme Court has held that Congress "cannot compel the States to enact or enforce a federal regulatory program" and "cannot circumvent that prohibition by conscripting the States' officers directly." *Printz v United States*, 521 US 898, 935 (1997). *Alden* stated:

> A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States. [*Alden*, 527 US at 749 (citation omitted).]

Others have expressly argued that, based on the anticommandeering doctrine and other constitutional principles, "Congress cannot commandeer the state legislature by forcing them to vest their state courts with jurisdiction, or forcing state judges to hear cases where they otherwise lack jurisdiction." Blackman, *State Judicial Sovereignty*, 2016 U Ill L Rev 2033, 2038 (2016).[17]

The United States Supreme Court has established a line of caselaw holding that states cannot disfavor federal causes of action, but it has

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[17] The Supreme Court has observed that, in numerous instances, Congress has imposed obligations on "state judges to enforce federal prescriptions" related to the judicial power. *Printz*, 521 US at 907 (emphasis omitted). But in *Printz*, the Court noted that the source of that power was "perhaps implicit in one of the provisions of the Constitution, and was explicit in another," *id*., neither of which is at issue here. Further, and importantly, the Court explained that "[i]t may well be . . . that these requirements applied only in States that authorized their courts to conduct" the proceedings at issue. *Id*. at 906. As one scholar noted, this seemed to say that "state sovereignty placed a check on the ability of Congress to conscript the state courts into federal service. Congress could pass these statutes, but it wasn't clear that state courts could comply if they lacked the jurisdiction to do so in the first

expressly declined to decide whether this caselaw requires states to open their courts to these actions. In contending that the state must open its courts to the federal claims at issue, plaintiffs primarily rely on two such decisions by the United States Supreme Court. In the first, *Howlett v Rose*, 496 US 356 (1990), a Florida statute waiving sovereign immunity was determined to be inapplicable to federal claims brought in state court. A local government invoked that immunity to avoid the federal action in state court and the state courts dismissed the claims with prejudice, meaning that the action could not be subsequently brought in federal courts. *Id*. at 359-361, 365-366. The Court held that this violated the Supremacy Clause, which prohibited "state courts [from] dissociat[ing] themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id*. at 371. The Court acknowledged that states could establish the jurisdiction of their courts and stated that it would "act with utmost caution before deciding that [a state court] is obligated to entertain the claim." *Id*. at 372. But any such rule, even if denominated a "jurisdictional" rule, has to be neutral. *Id*. at 372, 381-382. The statute was not neutral because it singled out federal claims, which were treated differently from similar claims that could be brought in Florida's courts of general jurisdiction. *Id*. at 378.

As a result of this analysis, the Court expressly declined to address the question in the instant matter: "This case does not present the question[] whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights . . . ." *Id*. Thus, the opinion could not be read to apply, by its terms, to the present cases. It would require an *extension* of *Howlett*. Further, the critical portion of the Court's reasoning in *Howlett* came at the end of the opinion:

> [A]s to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to [42 USC] 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People. [*Id*. at 383.]

A key problem with Florida's statute—one not present here—is that it led to dismissals *with prejudice*. As Justice Thomas observed, this form of dismissal represented "a decision . . . on the merits," and thus the statutory rule "violated the Supremacy Clause by operating as a state-law defense to a federal law." *Haywood v Drown*, 556 US 729, 763 (2009) (Thomas, J., dissenting) (discussing *Howlett*). This is significantly different than a true jurisdictional rule, which "simply clos[es]

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place." *State Judicial Sovereignty*, p 2053. Thus, there is a case to be made that conscripting state courts to enforce federal statutes would violate the Tenth Amendment.

the door of the state courthouse to [the] federal claim." *Id*. A state rule that "[r]esolv[es] a federal claim with preclusive effect . . . changes federal law by denying relief on the merits," whereas a true jurisdictional rule "merely dictates the forum in which the federal claim will be heard." *Id*. at 763-764.

In the present cases, my interpretation of the COC Act does not result in denials of federal claims on the merits. A case that is dismissed under MCL 600.6440 would not be dismissed with prejudice and therefore could be subsequently brought in federal court. It would, thus, simply "dictate[] the forum in which the federal claim will be heard." *Id*. at 764. Consequently, reading § 6440 to require actions like the present one to go to federal court does not contradict *Howlett*.

The second pillar of plaintiffs' argument is *Haywood*. But there, once again, the Supreme Court expressly declined to address whether the Supremacy Clause requires states to create judicial fora for the adjudication of certain claims. *Haywood*, 556 US at 739 (opinion of the Court) ("[T]his case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to [42 USC] 1983."). The specific issue in *Haywood* was whether the Supremacy Clause was violated by a state jurisdictional statute providing that 42 USC 1983 actions against correctional officers had to be brought in the court of claims. NY Correction Law 24 (stating that no civil action could be brought against such officers in any court of the state in the officers' personal capacity and that any claim against the officers had to "be brought and maintained in the court of claims as a claim against the state"). By forcing the claim to go to the court of claims, the statute forced the plaintiffs "to pursue a claim for damages against an entirely different party (the State) in the Court of Claims—a court of limited jurisdiction." *Haywood*, 556 US at 734.[18]

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[18] It appears that, as in *Howlett*, one of the problems with the state statute was that it allowed courts to dispose of cases on the merits: "Although the State has waived its sovereign immunity from liability by allowing itself to be sued in the Court of Claims, a plaintiff seeking damages against the State in that court cannot use § 1983 as a vehicle for redress because a State is not a 'person' under § 1983." *Haywood*, 556 US at 734 n 4. The upshot of the statute, then, was that there was essentially no relief available in state court for this narrow class of § 1983 claims. The Court largely relied on other rationales, however.

Haywood held that the principal reason the New York statute proved unconstitutional was that it represented a policy preference against this class of lawsuits, and that policy was contrary to federal policy as represented by 42 USC 1983. *Id*. at 736-737. This was true even though the state statute was facially neutral as to federal and state law. As in *Howlett*, the Court relied on the fact that the state had courts of general jurisdiction that could otherwise adjudicate claims under 42 USC 1983. *Id*. at 740. The state could not shut the door to this "particular species of suits" in an attempt "to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners)." *Id*. at 739-740, 741-742.

No such contradiction of federal policy exists in the present cases. The parties have not suggested that MCL 600.6440 represents an impermissible judgment about a class of litigation. By its terms, § 6440 does not even mention federal claims, let alone a particular slice of claims such as those at issue in *Haywood*.[19] Moreover, § 6440 does not shield defendants from liability—it simply requires that the liability be adjudicated in federal court. A further distinction between the present cases and *Haywood* and *Howlett* is that those cases did not involve claims against the state. The statute at issue in those cases, 42 USC 1983, does not apply to states. *Will v Mich Dep't of State Police*, 491 US 58, 66 (1989). Consequently, neither decision can be read as an indication of what the Supreme Court would do with a federal claim that can be brought against the state but for which the state has *never* created a court to hear.[20]

For these reasons, I do not believe that the Supremacy Clause caselaw from the Supreme Court applies here. Perhaps that Court would extend it to the present circumstances, but that would require a new rationale and mode of logic that is not articulated in the caselaw.

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[19] For that reason, § 6440 is broad enough to encompass state-law claims against the state that could be adjudicated in federal courts. For example, if the federal court had federal-question jurisdiction over a federal claim, it would also have supplemental jurisdiction over any state-law claim described above. 28 USC 1367(a). Of course, it may seem unusual that the state has waived sovereign immunity for such claims in federal court but not state court. Still, this all goes to show the potential breadth of the statute here, making it quite unlike the statutes dealt with by the Supreme Court.

[20] To the extent that *Howlett* dealt with immunity, the immunity at issue was statutory and pertained to governmental units below the state level. The Supreme Court "has repeatedly refused to extend sovereign immunity to counties" and other municipalities. *Northern Ins Co*, 547 US at 193.

III. CONCLUSION

The Court of Appeals decision below opens the doors of the circuit court to certain claims against the state that have never before been heard by that court. By its plain terms, MCL 600.6440 requires these claims to be brought in federal court. This interpretation reflects longstanding caselaw on how jurisdiction relates to sovereign immunity, and it does not run afoul of the Supremacy Clause. I would therefore reverse the Court of Appeals judgment on these grounds. Consequently, I dissent from this Court's decision to deny leave.

ZAHRA and CLEMENT, JJ., join the statement of VIVIANO, J.

In re TEM, No. 164734; Court of Appeals No. 359529.

Leave to Appeal Denied November 22, 2022:

MJCC 8 MILE, LLC v BASRAH CUSTOM DESIGN, INC, Nos. 164442 and 164443; Court of Appeals Nos. 346969 and 357238.

MJCC 8 MILE, LLC v BASRAH CUSTOM DESIGN, INC, No. 164501; Court of Appeals No. 346969.

ANDERSON v TRANSDEV SERVICES, INC, No. 164540; reported below: 341 Mich App 501.

NORTON v PRINCETON REAL ESTATE, LLC, No. 164719; Court of Appeals No. 360230.

MCVEETY v LOU LARICHE CHEVROLET, INC, No. 164889; Court of Appeals No. 361253.

Summary Disposition November 29, 2022:

RIVERBROOK v FABODE, No. 162330; reported below: 333 Mich App 645. On October 12, 2022, the Court heard oral argument on the application for leave to appeal the September 17, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). We VACATE in part the judgment of the Court of Appeals to the extent that it can be read to stand for the proposition that expert-witness testimony must be provided in all cases in which a person is seeking a reasonable accommodation under 42 USC 3604(f)(3)(B) of the Fair Housing Act (FHA), or MCL 37.1506a(1)(b) of the Persons with Disabilities Civil Rights Act. The statutes contain no such requirement. We AFFIRM the Court of Appeals' decision to remand this case for further proceedings. The panel correctly concluded that further proceedings are necessary before this matter can be resolved. The district court erred by treating Anne Venet's letter as automatically satisfying the requirements of the FHA and denying the writ of eviction without allowing the record to be developed. On remand, the court should reconsider whether the defendants satisfied their burden of establishing their FHA defense. 42 USC 3604(f)(3)(B); see also *Overlook Mut Homes, Inc v Spencer*, 415 Fed Appx 617, 621 (CA 6, 2011).

WELCH, J. (*concurring in part and dissenting in part*). I agree with the majority that expert witness testimony is not needed whenever a reasonable-accommodation request is at issue in a court proceeding. I also agree with the decision to affirm the Court of Appeals' remand of this case for further proceedings. However, I would also vacate the Court of Appeals' holding that Anne Venet's testimony and the letter that she authored must be evaluated under MRE 702. Venet appeared before the district court because the court (properly in my opinion) issued a subpoena sua sponte, not because a party called her as a witness. The record concerning Venet is relatively undeveloped because the district court erred by precluding plaintiff from questioning Venet about the factual basis for the opinion she provided in favor of defendants. Given that this line of questioning was prohibited by the district court, I believe it was premature for the Court of Appeals to conclude that the evidence associated with Venet must be evaluated under MRE 702, as opposed to MRE 701 and the rules governing hearsay. There is at least a possibility that Venet could testify as a fact witness regarding the need for an accommodation on the basis of what was discussed on the phone if a phone conversation with a limited license professional counselor can qualify as a statement made for purposes of medical treatment or medical diagnosis. See MRE 803(4). The Court has scant information about the factual basis for the opinion provided in the letter Venet authored because plaintiff was not permitted to ask Venet about her conversation with the party seeking a reasonable accommodation. Questions regarding how to characterize Venet's testimony and the letter she authored, as well as what rules of evidence are applicable, are best resolved by the district court on remand. I respectfully dissent from the majority's decision to leave undisturbed the Court of Appeals' holding that the evidence related to Venet must be evaluated under MRE 702.

CAVANAGH, J., joins the statement of WELCH, J.

PEOPLE V JENNIFER CRUMBLEY, No. 164883; Court of Appeals No. 362211. On order of the Court, the motion for stay and immediate consideration is GRANTED. The application for leave to appeal the September 14, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted, limited to whether there was sufficient evidence of causation to bind the defendant over for trial on the charges of involuntary manslaughter. We direct the Court of Appeals' attention to the fact that we have also remanded *People v James Robert Crumbley* (Docket No. 164885) to the Court of Appeals for consideration as on leave granted of the same issue. Trial court proceedings in the Oakland Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

BERNSTEIN, J. (*dissenting*). I respectfully dissent. While I recognize that this case raises a number of novel legal issues, the appellate process is designed such that many of those issues are more appropriately considered *after* trial, if necessary. The only question that must be addressed at this stage of the proceedings is defendant's challenge to the finding that probable cause exists to support the bindover. See *People v Yost*, 468 Mich 122, 124 n 2 (2003). I believe that considering whether the prosecutor has presented sufficient evidence of causation to support the bindover of defendant here before trial will not provide the Court of Appeals with a full picture of the relevant evidence and testimony. Moreover, addressing causation at this stage will unnecessarily delay the trial proceedings, which are set to begin in January. In order to avoid needless delay, I would prefer to remand to the Court of Appeals simply for that court to reconsider defendant's challenge to the denial of the motion to quash in light of the concern articulated in *Yost*, as I believe any substantive questions pertaining to causation should not be addressed until after trial is complete.

PEOPLE V JAMES CRUMBLEY, No. 164885; Court of Appeals No. 362210. On order of the Court, the motion for stay and immediate consideration is GRANTED. The application for leave to appeal the September 14, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted, limited to whether there was sufficient evidence of causation to bind the defendant over for trial on the charges of involuntary manslaughter. We direct the Court of Appeals' attention to the fact that we have also remanded *People v Jennifer Lynn Crumbley* (Docket No. 164883) to the Court of Appeals for consideration as on leave granted of the same issue. Trial court proceedings in the Oakland Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

BERNSTEIN, J. (*dissenting*). I respectfully dissent. While I recognize that this case raises a number of novel legal issues, the appellate process is designed such that many of those issues are more appropriately considered *after* trial, if necessary. The only question that must be addressed at this stage of the proceedings is defendant's challenge to the finding that probable cause exists to support the bindover. See *People v Yost*, 468 Mich 122, 124 n 2 (2003). I believe that considering whether the prosecutor has presented sufficient evidence of causation to support the bindover of defendant here before trial will not provide the Court of Appeals with a full picture of the relevant evidence and testimony. Moreover, addressing causation at this stage will unnecessarily delay the trial proceedings, which are set to begin in January. In order to avoid needless delay, I would prefer to remand to the Court of Appeals simply for that court to reconsider defendant's challenge to the denial of the

motion to quash in light of the concern articulated in *Yost*, as I believe any substantive questions pertaining to causation should not be addressed until after trial is complete.

Summary Disposition November 30, 2022:

PEOPLE v ALEX JOHNSON, No. 164105; Court of Appeals No. 359863. By order of September 6, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the February 11, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Genesee Circuit Court for an evidentiary hearing on whether the record in this case, together with the records in 67th District Court Docket No. 20T01521 and Genesee Circuit Court Docket No. 21-047577-FH, along with any other evidence the parties may present, establishes that the defendant was incompetent at the time of his probation violation hearing and sentencing in this case. *People v Lucas*, 393 Mich 522, 529 (1975) (post-conviction claims of incompetency should be reviewed following an evidentiary hearing in the trial court). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v HECKAMAN, No. 164604; Court of Appeals No. 354888. On order of the Court, the application for leave to appeal the May 19, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III(A) of the judgment of the Court of Appeals and we REMAND this case to that court for reconsideration of that ineffective assistance of counsel claim. Although the Court of Appeals cited the correct standard for assessing prejudice under *Strickland v Washington*, 466 US 668 (1984), it failed to apply that standard. The defendant was not required to show that, but for counsel's deficient performance, he *would have been acquitted*. Rather, prejudice is established where a defendant shows that "but for counsel's deficient performance, there is *a reasonable probability* that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012) (emphasis added). On remand, the Court of Appeals shall resolve the defendant's claim of ineffective assistance of counsel set forth in Part III(A) under this standard. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Denied November 30, 2022:

PEOPLE v STEANHOUSE, No. 164041; Court of Appeals No. 356080.

PEOPLE v CLIFTON, No. 164071; Court of Appeals No. 359243.

PEOPLE v DANSBY, No. 164128; Court of Appeals No. 351034.

MICHIGAN HEALTH AND WELLNESS CENTER LLC v CHARTER TOWNSHIP OF ROYAL OAK, No. 164289; Court of Appeals No. 356003.

PEOPLE v MITCHELL, No. 164291; Court of Appeals No. 359257.

In re ANNE M SPIVAK REVOCABLE TRUST and *In re* SPIVAK ESTATE, Nos. 164366-164370; Court of Appeals Nos. 354465, 354466, 354469, and 354471.

PEOPLE v MORGAN, No. 164351; Court of Appeals No. 353557.

PEOPLE v MARIO CHILDS, No. 164359; Court of Appeals No. 354401.

PEOPLE v KLINE, No. 164394; Court of Appeals No. 355206.

YEE v AAA INSURANCE, No. 164397; Court of Appeals No. 356603.

PEOPLE v LYONS, No. 164412; Court of Appeals No. 355494.

PEOPLE v WALDON, No. 164453; Court of Appeals No. 358940.

In re DOROTHY MARIE TALANDA TRUST, No. 164470; Court of Appeals No. 356293.

PEOPLE v LOPEZ, No. 164508; Court of Appeals No. 356875.

PEOPLE v DARYL DAVIS, No. 164510; Court of Appeals No. 359336.

PEOPLE v BAILEY, No. 164543; Court of Appeals No. 338351.

PEOPLE v THORNTON, No. 164563; Court of Appeals No. 356499.

PEOPLE v HENRY SMITH, No. 164568; Court of Appeals No. 359945.

YOUSIF v BERRY, No. 164572; Court of Appeals No. 360562.

COHEN v CITY OF OAK PARK, No. 164573; Court of Appeals No. 356993.

In re ESTATE OF GREGORY PRICE BURNETT, No. 164586; Court of Appeals No. 357500.

PEOPLE v SHANE, No. 164587; Court of Appeals No. 360687.

ROBERTSON v WILLIAM BEAUMONT HOSPITAL, No. 164588; Court of Appeals No. 356923.

PEOPLE v CHRISTOPHER TAYLOR, No. 164595; Court of Appeals No. 360022.

PEOPLE v FOSTER, No. 164620; Court of Appeals No. 360844.

PEOPLE v FAWKES, No. 164623; Court of Appeals No. 360499.

SPARLING v SPARLING, No. 164641; Court of Appeals No. 355843.

PEOPLE v CHEHOWSKI, No. 164651; Court of Appeals No. 361148.

BROOKS WILLIAMSON & ASSOCIATES, INC v BRAUN, No. 164654; Court of Appeals No. 357170.

PATEL v PATEL, No. 164655; Court of Appeals No. 360304.

PATEL v PATEL, No. 164657; Court of Appeals No. 360635.

PEOPLE v VANDIVER, No. 164664; Court of Appeals No. 360494.

PEOPLE v RONALD WILLIAMS, No. 164673; Court of Appeals No. 360707.

PEOPLE v PALMER, No. 164675; Court of Appeals No. 360187.

PEOPLE v MACKENZIE, No. 164676; Court of Appeals No. 354250.

ALPERT v ALPERT, No. 164684; Court of Appeals No. 351435.

MAYS v UNIVERSAL UTILITIES, INC, No. 164686; Court of Appeals No. 357077.

PEOPLE v ERROL SMITH, No. 164688; Court of Appeals No. 361954.

PEOPLE v LOCKHART, No. 164701; Court of Appeals No. 359755.

In re APPLICATION OF CONSUMERS ENERGY FOR ONE-TIME REVENUE REFUND, No. 164703; Court of Appeals No. 357466.

PEOPLE v OWENS, No. 164704; Court of Appeals No. 360749.

SOAVE v HOPKINS, No. 164707; Court of Appeals No. 357651.

PEOPLE v LOWREY, No. 164710; reported below: 342 Mich App 99.

PEOPLE v GADDIS, No. 164715; Court of Appeals No. 360608.

FINDLER v DEPARTMENT OF TECHNOLOGY MANAGEMENT AND BUDGET, No. 164720; Court of Appeals No. 358156.

ADVANCE STEEL CORPORATION v ELIA, No. 164721; Court of Appeals No. 357687.

PEOPLE v JEROME WATSON, No. 164729; Court of Appeals Nos. 353605 and 356971.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v GAMET, No. 164732; Court of Appeals No. 360859.

PEOPLE v TIMOTHY TALLEY, No. 164739; Court of Appeals No. 361591.

PEOPLE v CASTON, Nos. 164741 and 164742; Court of Appeals No. 358510 and 358514.

ZAHRA, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v MARITA TALLEY, No. 164756; Court of Appeals No. 356518.

PEOPLE v MOZDEN, No. 164768; Court of Appeals No. 360730.

CLOVERLEAF CAR COMPANY v CASCADE UNDERWRITERS INC, No. 164770; Court of Appeals No. 357435.

D&R MAINTENANCE MANAGEMENT, INC v 955 S MONROE LLC and 955 S MONROE v D&R MAINTENANCE MANAGEMENT, INC, Nos. 164776 and 164777; Court of Appeals Nos. 357867 and 357879.

LOCKHART v QUICKEN LOANS, INC, No. 164782; Court of Appeals No. 355709.

PEOPLE v SCHILLING, No. 164784; Court of Appeals No. 361341.

SIMS v FOX RIDGE APARTMENTS, No. 164786; Court of Appeals No. 360837.

PEOPLE v DARNELL, No. 164789; Court of Appeals No. 361808.

DM&M INVESTMENTS, LLC v SAVVY SLIDERS COMPANY, LLC, No. 164794; Court of Appeals No. 360630.

WHITLOW v LEWIS, No. 164795; Court of Appeals No. 354968.

PEOPLE v MANWELL, No. 164798; Court of Appeals No. 333916.

PEOPLE v SHORT, No. 164803; Court of Appeals No. 358080.

PEOPLE v GOOLSBY, No. 164806; Court of Appeals No. 361593.

PEOPLE v SCHULTZ, No. 164808; Court of Appeals No. 358864.

PEOPLE v SOTO, No. 164813; Court of Appeals No. 362080.

LOVE v LAWSON, No. 164924; Court of Appeals No. 362141.

CHARTER TOWNSHIP OF LANSING v CITY OF LANSING, No. 164925; Court of Appeals No. 362897.

CHARTER TOWNSHIP OF LANSING v CITY OF LANSING, No. 164927; Court of Appeals No. 363214.

Superintending Control Denied November 30, 2022:

DIX v ATTORNEY GRIEVANCE COMMISSION, No. 164731.

Reconsideration Denied November 30, 2022:

In re BEARD, No. 162832; Court of Appeals No. 355073.

PEOPLE v LAWRENCE COLLEY, No. 164132; Court of Appeals No. 359186.

PEOPLE v JOHNATHON MCMAHEN, No. 164168; Court of Appeals No. 358942.

PEOPLE v KASANKIEWICZ-COOK, No. 164217; Court of Appeals No. 358036.

MAXEY v BOTSFORD GENERAL HOSPITAL, No. 164239; Court of Appeals No. 353920.

SCHULTES v ATTORNEY GRIEVANCE COMMISSION, No. 164325.

PEOPLE v KEENAN KING, No. 164382; Court of Appeals No. 359261.

Summary Disposition December 2, 2022:

PEOPLE v ZUNIGA, No. 154821; Court of Appeals No. 324157. By order of September 22, 2021, the application for leave to appeal the September 29, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Taylor* (Docket No. 154994). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 112 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part II of the judgment of the Court of Appeals, VACATE the sentence of the Kent Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a disproportionate sentence. *Taylor*, *supra*. Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent from the order vacating in part the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

PEOPLE v HICKERSON, No. 160614; Court of Appeals No. 322891. By order of September 22, 2021, the application for leave to appeal the October 8, 2019 judgment of the Court of Appeals and the motion to remand were held in abeyance pending the decision in *People v Taylor* (Docket No. 154994). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 112 (2022), the application and motion to remand are again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals, VACATE the sentence of the Oakland Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a disproportionate sentence. *Taylor*,

supra. Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to remand is DENIED as moot.

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I would remand to the trial court for an evidentiary hearing on defendant's ineffective assistance of counsel claim. See *People v Ginther*, 390 Mich 436 (1973). For these reasons, I respectfully dissent.

PEOPLE V RUNYON, No. 162103; Court of Appeals No. 346601. By order of September 22, 2021, the application for leave to appeal the June 25, 2020 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Taylor* (Docket No. 154994). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 112 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part II of the judgment of the Court of Appeals, VACATE the sentence of the Kent Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a disproportionate sentence. *Taylor*, *supra*. Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. The motion for stay is DENIED.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent from the order vacating in part the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

PEOPLE V CLEMONS, No. 162597; Court of Appeals No. 347225. By order of December 1, 2021, the application for leave to appeal the December 17, 2020 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Taylor* (Docket No. 154994). On order of the Court, the case having been decided on July 28, 2022, 510 Mich

112 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals, VACATE the sentence of the Kent Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, *by clear and convincing evidenc*e, that life without parole is a disproportionate sentence. *Taylor*, *supra*. Because the sentencing court in this case did not apply the "clear and convincing" standard, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent from the order vacating in part the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

PEOPLE V WHEELER, No. 164142; Court of Appeals No. 354746. On order of the Court, the application for leave to appeal the February 24, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE Part V of the judgment of the Court of Appeals, VACATE Part III of the judgment of the Court of Appeals, VACATE the sentence of the Shiawassee Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a disproportionate sentence. *People v Taylor*, 510 Mich 112 (2022). Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent from the order reversing

in part the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

Summary Disposition December 7, 2022:

MARKEL v WILLIAM BEAUMONT HOSPITAL, No. 163086; Court of Appeals No. 350655. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered, we REVERSE the April 22, 2021 judgment of the Court of Appeals and REMAND this case to that court for reconsideration under the proper legal standard.

To establish a claim of ostensible agency, a plaintiff must show:

> [First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person relying on the agent's apparent authority must not be guilty of negligence. [*Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 253 (1978) (quotation marks and citations omitted; alterations in original).]

In *Grewe*, a patient presented at the emergency room for treatment and received care from a doctor with whom she had no preexisting relationship. *Id*. at 246, 254. The *Grewe* Court explained that to determine if ostensible agency exists, "the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems." *Id*. at 251. When determining in *Grewe* that the patient had been looking to the hospital for treatment rather than as a mere situs, we acknowledged as significant that there was "nothing in the record which should have put the plaintiff on notice that [the doctor] . . . was an independent contractor as opposed to an employee of the hospital" and there was "no record of any preexisting patient-physician relationship with any of the medical personnel who treated the plaintiff at the hospital." *Id*. at 253-255. A patient who has clear notice of a treating physician's employment status or who has a preexisting relationship with a physician outside of the hospital setting cannot reasonably assume that the same physician is an employee of the hospital merely because treatment is provided within a hospital.

In concluding the doctor was the hospital's ostensible agent, the *Grewe* Court cited the emergency room setting and the lack of a preexisting relationship between doctor and patient. The rule from *Grewe* is that when a patient presents for treatment at a hospital emergency room and is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital's agent is reasonable unless the hospital does something to dispel that belief. Put another way, the "act or neglect" of the hospital is

operating an emergency room staffed with doctors with whom the patient, presenting themselves for treatment, has no prior relationship. See also *Brackens v Detroit Osteopathic Hosp*, 174 Mich App 290 (1989); *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 603 (1997); *Zdrojewski v Murphy*, 254 Mich App 50, 67-68 (2003). The Court of Appeals majority opinion looked to other Court of Appeals decisions purporting to apply *Grewe* to conclude that the plaintiff's ostensible agency claim failed. The panel majority cited *VanStelle v Macaskill*, 255 Mich App 1, 10 (2003), for the requirement that "the putative principal must have done something that would create in the patient's mind the reasonable belief" of agency. But a core aspect of our holding in *Grewe* was that "[a]n agency is ostensible when the principal *intentionally or by want of ordinary care*, causes a third person to believe another to be his agent who is not really employed by him." *Grewe*, 404 Mich at 252 (quotation marks and citations omitted; emphasis added). To the extent that *VanStelle* requires a plaintiff to show some additional, affirmative act by the hospital in every emergency room case to prove ostensible agency, it is in direct tension with *Grewe* and therefore overruled.

But a hospital will not be vicariously liable under an ostensible agency theory every time a person receives medical treatment in a hospital. We agree with the panel majority that agency cannot arise "merely because one goes to a hospital for medical care." *Sasseen v Community Hosp Foundation*, 159 Mich App 231, 240 (1987). But that broad statement conceals the most important distinction between *Sasseen* and cases like it and this one: a preexisting relationship between doctor and patient.

The panel majority concluded that because the plaintiff "did not recall" the doctor who treated her at the hospital, she could not have formed a reasonable belief that the doctor was the hospital's agent. *Markel v William Beaumont Hosp*, unpublished per curiam opinion of the Court of Appeals, issued April 22, 2021 (Docket No. 350655), pp 6-7. This holding is in tension with *Grewe*, which held that when a patient presents at the emergency room for treatment, the patient's belief that a doctor is the hospital's agent is reasonable unless dispelled in some manner by the hospital or the treating physician. We also note that patient testimony is not required to establish ostensible agency under *Grewe*.

Judge BECKERING concurred because she believed the panel was bound by our preemptory order in *Reeves v MidMichigan Health*, 489 Mich 908 (2011). *Markel* (BECKERING, P.J., concurring), unpub op at 1. Otherwise, she would have concluded that under *Grewe*, the plaintiff had demonstrated a question of fact as to ostensible agency. *Id*. But *Reeves* was a one-sentence order adopting the "reasons stated" in Judge HOEKSTRA's dissenting opinion at the Court of Appeals. *Reeves*, 489 Mich at 908-909. The order did not explain which aspects of the dissent's analysis it adopted as its own and did not purport to overrule *Grewe*.

Judge HOEKSTRA would have held that there was no ostensible agency in *Reeves*, a case in which the patient presented at the emergency room and was treated by a physician with whom he seemingly had no preexisting relationship. *Reeves v MidMichigan Health*, unpublished

per curiam opinion of the Court of Appeals, issued September 30, 2010 (Docket No. 291855) (HOEKSTRA, J., dissenting), p 2; *id*. at 3 (opinion of the Court). Judge HOEKSTRA argued the hospital did not affirmatively act to create a belief of ostensible agency through its consent forms and lab coat insignia. But Judge HOEKSTRA failed to address how that reasoning fit with the rule from *Grewe* that when a patient is admitted to a hospital for emergency care and looks to the hospital for treatment of physical ailments, a hospital may have an obligation to dispel a patient's belief or assumption that those providing treatment are employed by the hospital. We take this opportunity to clarify that *Grewe* has never been overruled. To the extent *Reeves* created confusion about the application of *Grewe* to cases such as this, we limit *Reeves* to its facts. *Grewe* remains our rule.

Because the trial court and the Court of Appeals misinterpreted and misapplied *Grewe*, we remand this case for reconsideration under the appropriate standard. We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). In holding that a hospital's mere operation of an emergency room can subject it to liability under the ostensible-agency doctrine, the majority today purports to simply apply *Grewe v Mt Clemens Hosp*, 404 Mich 240 (1978). The fact that the majority must overrule caselaw from the Court of Appeals and all but overrule our own subsequent order in *Reeves v MidMichigan Health*, 489 Mich 908 (2011), however, demonstrates that this is no straightforward application of our precedent. *Grewe* itself was ambiguous and never directly addressed the key point at issue here. Over the decades since *Grewe*, the Court of Appeals has properly read that case to mean that, for ostensible agency to exist, defendant hospitals must engage in some act or neglect beyond simply operating an emergency room. By taking a broader reading of *Grewe*, the majority overturns this caselaw and disregards the foundations of the ostensible-agency doctrine, setting in motion a sweeping expansion of hospital liability without any accompanying practical benefit to injured plaintiffs. I therefore dissent.

I

On October 2, 2015, plaintiff Mary Anne Markel underwent surgery at defendant William Beaumont Hospital (defendant). She was discharged the same day. On October 9, 2015, she returned to defendant's emergency room with low back pain radiating to her legs, foot numbness, and inability to urinate. The following morning, she was placed in the emergency-room observation unit. Later that day, she was moved to a hospital floor. Plaintiff's internal medicine physician was Dr. John Bonema, who was part of Troy Internal Medicine, which had an agreement with Hospital Consultants PC, under which the latter group supplied services to the former. On October 10, the day after plaintiff arrived at the hospital, a physician from Hospital Consultants, Dr. Linet Lonappan, was assigned as plaintiff's attending physician. This assignment was pursuant to Troy Internal Medicine's arrangement with Hospital Consultants.

Plaintiff claims that Dr. Lonappan overlooked a key test result indicating that she had Group B Streptococcus, which came back three hours after her discharge. Plaintiff was not advised of this result, and the infection went untreated. She returned to defendant's emergency room on October 13, where she received treatment for the infection.

Plaintiff subsequently filed suit, alleging that Dr. Lonappan committed medical malpractice by not informing her of the test result or treating the infection. She further alleges that defendant is liable for Dr. Lonappan's negligence under the ostensible-agency doctrine.[1] Defendant moved for summary disposition, arguing that the record did not support plaintiff's claim of agency. Plaintiff testified at a deposition that she had no preexisting relationship with Dr. Lonappan, whom she believed worked for the defendant hospital. But she also testified that she had no specific recollections of Dr. Lonappan. She stated at the deposition that the name "Dr. Linet Lonappan" was "[n]ot at all" familiar to her, that she had no independent recollection of talking to the doctors at the hospital, and that she knew none of their names. She also said, "My understanding is my internists don't go to the hospital so if I have to go to the hospital they need someone medical to treat me they [sic] it to this kind of group." But she knew nobody in the group.

Dr. Lonappan testified that she would wear a white coat with defendant's insignia on it when she treated her patients and that her credentials (which she wore) listed her relationships with both Hospital Consultants and defendant. She further testified that it was her usual practice to tell patients that she was seeing them for their family doctor. She would say, for example, "I'm a hospitalist associated with Dr. Bonema." She was assigned to plaintiff by defendant's emergency-room staff pursuant to the agreement between her employer (Hospital Consultants) and Dr. Bonema's group. She also worked out of defendant's other hospitals in the area.

Plaintiff's cross-motion for summary disposition included an affidavit from plaintiff. In it, plaintiff stated that she did not know Dr. Lonappan prior to her hospital visit. Further, she said, "I was at all times under the impression that Dr. Linet Lonappan, as well as other medical staff at Beaumont Hospital . . . , were employees of Beaumont Hospital . . . ." Plaintiff stated that Dr. Lonappan did not tell her that she was not employed by defendant, and plaintiff further stated that she has worked at defendant for 30 years and was unaware that physicians were not hospital employees.

At her deposition, plaintiff testified that she did not remember interacting with Dr. Lonappan. Plaintiff's counsel conceded, at the summary disposition hearing, that there cannot be a reasonable reliance on something that plaintiff does not remember seeing. The trial court agreed with that assessment, holding that it could not be found that the hospital did anything to create a reasonable belief in plaintiff's

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[1] Plaintiff also argued that Dr. Lonappan was defendant's actual agent. The trial court held that Dr. Lonappan was not an actual agent. The Court of Appeals held that the grant of summary disposition on this issue was premature. This ruling has not been appealed.

mind that Dr. Lonappan was an agent of the hospital when plaintiff had no recollection of Dr. Lonappan at all.

Plaintiff sought to appeal in the Court of Appeals, which denied leave. This Court remanded to the Court of Appeals for consideration as on leave granted. Subsequently, the Court of Appeals affirmed in an unpublished per curiam opinion. The Court of Appeals noted that Dr. Lonappan's jacket contained the names of both defendant and Hospital Consultants and that Dr. Lonappan introduced herself as affiliated with plaintiff's family doctor. Judge BECKERING concurred, requesting that this Court clarify our caselaw on the matter, particularly the requirement that, in order to create an ostensible agency, the hospital engage in conduct that creates a reasonable belief that an agency relationship exists.

We then granted leave to take up the question "whether the Court of Appeals correctly applied the ostensible agency test" as articulated by our caselaw.

II

A

Under our decision in *Grewe*, a claim of ostensible agency requires a showing that, among other things, (1) the plaintiff reasonably believed that the agent was the defendant hospital's agent (2) because of "some act or neglect of the principal sought to be charged" and (3) the plaintiff was not guilty of negligence in relying on the apparent agency relationship. *Grewe*, 404 Mich 253 (quotation marks and citation omitted). Elsewhere in *Grewe* we stated that while hospitals generally are not vicariously liable for the negligence of physicians who are independent contractors, hospitals can be liable if the patient looked to the hospital for treatment "and there has been a *representation* by the hospital that medical treatment would be afforded by physicians working therein . . . ." *Id*. at 250-251 (emphasis added). In its application of the rule, however, *Grewe* asked only whether the plaintiff, when admitted to the hospital, sought treatment from the hospital or merely viewed it as the location where his or her physician would provide treatment. *Id*. at 251. It is unclear why *Grewe* limited its inquiry in this fashion. And *Grewe* never explained whether, or how, this question related to the "act or neglect" prong of its test. Indeed, *Grewe* never addressed the meaning of that prong at all.

Grewe's silence on this point does not deter the majority from divining its preferred rule from *Grewe*. The majority reads *Grewe* as holding that for a plaintiff visiting an emergency room who "is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital's agent is reasonable unless the hospital does something to dispel that belief." But this gloss on *Grewe* gives hardly any meaning to the "act or neglect" requirement in this context. One would think that an "act" or "neglect" that creates a reasonable belief of an agency relationship represents something more

than the hospital simply operating an emergency room with doctors and other staff. One commentator has similarly observed that, by itself, the act-or-neglect requirement would appear to "stand[] as a significant obstacle to plaintiff's recovery" against the hospital. Comment, *Hospital Liability for the Right Reasons: A Non-Delegable Duty to Provide Support Services*, 42 Seton Hall L Rev 1337, 1347 (2012). The bare act of opening an emergency room says little at all about the employment status of those who staff it.

Thus, it is no surprise that for decades the Court of Appeals and this Court have indicated that the act-or-neglect requirement demands something more than the emergency room's mere existence. Trying to make sense of *Grewe*, the Court of Appeals in *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29 (1991), opined that *Grewe* framed its " 'critical question' "—i.e., whether the patient looked to the hospital for care—as it did "because of the facts of that case . . . ." *Id*. at 32, quoting *Grewe*, 404 Mich at 251. "Nothing in *Grewe* indicates that a hospital is liable for the malpractice of independent contractors merely because the patient 'looked to' the hospital at the time of admission or even was treated briefly by an actual nonnegligent agent of the hospital." *Chapa*, 192 Mich App at 33. Such an expansive view of ostensible agency "would not only be illogical, but also would not comport with fundamental agency principles noted in *Grewe* . . . . Simply put, defendant, as putative principal, must have done something that would create in [the patient's] mind the *reasonable* belief that [the physicians] were acting on behalf of defendant." *Id*. at 33-34. A little more than a decade later, the Court of Appeals reaffirmed this analysis and added that "[a]gency 'does not arise merely because one goes to a hospital for medical care.' " *VanStelle v Macaskill*, 255 Mich App 1, 11 (2003), quoting *Sasseen v Community Hosp Foundation*, 159 Mich App 231, 240 (1986).[2]

More importantly still, this Court endorsed such a view in *Reeves*, 489 Mich 908, when we adopted the dissenting opinion from the Court of Appeals. It is worth noting that both the majority and dissenting opinions in *Reeves*, which similarly addressed emergency-room care, rejected the position now advanced by the majority. The Court of Appeals majority explained that *Grewe*'s " 'critical question' . . . was intended to relate to the patient's belief about the physician's relationship to the hospital, *while taking into consideration the hospital's behavior*." *Reeves v MidMichigan Health*, unpublished per curiam opinion of the Court of Appeals, issued Sept 30, 2010 (Docket No.

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[2] Indeed, some of the very cases the majority cites for its core rule—that "the 'act or neglect' of the hospital is operating an emergency room staffed with doctors with whom the patient, presenting themselves for treatment, has no prior relationship"—actually cut against it. For example, in *Brackens v Detroit Osteopathic Hosp*, 174 Mich App 290, 293 (1989), the Court of Appeals stated that ostensible agency can exist "if the individual looked to the hospital to provide medical treatment and there was a *representation* by the hospital that medical treatment would be afforded by physicians working therein . . . ." (Emphasis added.)

291855), p 2. The majority went on to explain that the hospital must hold itself out or allow others to portray it as the principal. *Id*. at 2-3. In its analysis, the majority scrutinized the evidence beyond the hospital's mere operation of a hospital room, looking for other proof that the plaintiff was reasonably led to believe that the defendant hospital was the principal, including who assigned the treating physician, what logo appeared on the physician's coat, and the forms and paperwork given to the plaintiff. *Id*. The dissenting judge did not disagree with the majority's rule, only the application of it. *Id*. (HOEKSTRA, J., dissenting) at 2. He did not believe that the paperwork given to the plaintiff was sufficient to cause a reasonable belief because it said nothing about the relationship between the treating physicians and the hospital. *Id*. And the lab coat did not bear the hospital's emblem. *Id*. Thus, "there [was] no evidence in the record that defendant did or failed to do anything that would create a reasonable belief that [the physician] was acting on its behalf." *Id*.

This analysis—which we adopted—is logically inconsistent with the present majority's reading of *Grewe*. If *Grewe* simply required that the hospital operate an emergency room and provide doctors with no preexisting relationship to the plaintiff patient, then *Grewe*'s test would have been satisfied in *Reeves* and we would have either let the Court of Appeals' majority opinion stand or affirmed it. But we did not. *Reeves* thus conflicts with the majority's reading of *Grewe*.[3]

B

The majority does not offer any reason to justify its broad holding today. Despite the caselaw discussed above, establishing a different and much more plausible reading of the ambiguities in *Grewe*, the majority simply declares that this reading is inconsistent with *Grewe* itself. In doing so, the majority treats its holding as a settled rule and avoids the need to offer any rationales for it. Perhaps this is because there is little legal support for this rule.

The view of *Grewe* found in *Chapa*, *VanStelle*, and *Reeves* better reflects the doctrines underpinning ostensible agency and our pre-*Grewe* caselaw on this subject (which, for now at least, remains valid precedent). Ostensible agency is rooted in equitable estoppel.[4] Generally speaking, "[e]quitable estoppel is not an independent cause of action,

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[3] The majority purports to limit *Reeves* to its facts, which means it is essentially overruled—the logic of *Reeves* is fundamentally inconsistent with the majority's holding and therefore can have no future application.

[4] See also 2A CJS, Agency, § 8, p 343 ("Ostensible agency is based on the notion of estoppel . . . ."); *id*. at § 49, pp 371-372 ("Apparent agency is essentially agency by estoppel, which is rooted in the doctrine of equitable estoppel and is based upon the idea that if a principal creates the appearance that someone is his or her agent, that principal should not then be permitted to deny the agency if an innocent third party responsibly relies on the apparent agency and is harmed as a result.").

but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 527 (2002) (quotation marks and citation omitted). In the present context, this would mean that, as a result of the defendant's conduct, the defendant is precluded from denying that an agency relationship exists.

To be subject to the equitable-estoppel doctrine, the defendant usually must do something more than simply operate a business—generally, there must be a misrepresentation or concealment of material facts. See McWilliams & Russell, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 SC L Rev 431, 448 (1996) ("Generally speaking, estoppel can proceed either from 'some definite misrepresentation of fact, made with reason to believe that another will rely upon it,' or from silence in the knowledge that another misunderstands the silence and is acting in reliance on the misunderstanding."), quoting Prosser & Keeton, Torts (5th ed), § 105, p 733. The Second Restatement of Agency similarly noted that imposition of liability based on estoppel required some higher degree of culpable conduct on the part of the putative principal:

> [W]here a purported principal has not affirmatively misled the third person but has merely carelessly failed to take affirmative steps to deny that another was his agent, the imposition of liability is so extraordinary that it is doubtful whether he should be made liable to a third person who has made a contract with the pretended agent but has not otherwise changed his position. [1 Restatement (Second) of Agency, § 8, comment *d*, p 33.]

This reflects the fact that "estoppel, although founded in fairness, works fairness for a party only where there is some element of fault in the behavior of the other party." *Hospital Liability for Torts*, 47 SC L Rev at 448. We have likewise stated:

> The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which by his own conduct he has induced another to believe did not exist. *Hubbard* v. *Shepard*, 117 Mich. 25 (72 Am. St. Rep. 548) [1898]. To entitle a party to insist upon an estoppel, he must show that the other party has done something, or represented something, which has had the effect of deceiving and misleading him, and which would render it inequitable to enforce against him the alleged right of such other party. *Crane* v. *Reeder*, 25 Mich 303 [1872]. There can be no estoppel unless a party is misled to his prejudice by the one against whom it is set up. *Palmer* v. *Williams*, 24 Mich. 328 [1872]; *DeMill* v. *Moffat*, 49 Mich. 125 [1882]; *Meisel* v. *Welles*, 107 Mich 453 [1895]. There can be no estoppel where one is not deceived or misled, but acts upon his own judgment and with knowledge of the facts. *Northern Michigan Lumber Co*. v. *Lyon*, 95 Mich 584 [1893]; *Thirlby* v. *Rainbow*, 93 Mich 164 [1892]. And a

> party cannot invoke the aid of the doctrine of equitable estoppel where it appears that the facts were known by both or that both had the same means of ascertaining the truth. *Sheffield Car Co.* v. *Constantine Hydraulic Co.*, 171 Mich 423 (Ann. Cas. 1914B, 984) [1912]. [*Shean v US Fidelity & Guaranty Co*, 263 Mich 535, 541 (1933).]

See also *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270 (1997) ("One who seeks to invoke the doctrine generally must establish that there has been," among other things, "a false representation or concealment of a material fact . . . ."). In a similar vein, in the context of a title dispute, we said that "[t]he basis of estoppel is fraud. The doctrine, being equitable, is dependent upon the circumstances . . . ." *Colonial Theatrical Enterprises v Sage*, 255 Mich 160, 171 (1931); see also *Moore v First Security Cas Co*, 224 Mich App 370, 376 (1997) ("The doctrine of equitable estoppel rests on broad principles of justice . . . ."). In numerous other ostensible-agency cases, we have emphasized the "act" or "neglect" requirement.[5]

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[5] See *Reichert v State Savings Bank of Royal Oak*, 274 Mich 126, 131 (1936) ("Agency may be established by an estoppel to deny the existence of such an agency by persons who, *through their conduct*, have given others reason to believe that such agency exists.") (emphasis added); *Plankinton Packing Co v Berry*, 199 Mich 212, 217 (1917) (" 'Gathering together all of these elements, it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity—whether it be in a single transaction or in a series of transactions—his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority.' ") (citation omitted); *Pettinger v Alpena Cedar Co*, 175 Mich 162, 165-166 (1913) ("This rule [i.e., "agency by estoppel"] has been stated as follows: 'It is a general rule that when a principal by any such acts or conduct has *knowingly caused or permitted* another to appear to be his agent either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.' ") (emphasis added; citation omitted); see generally 12 Williston on Contracts (4th ed), § 35:11, p 286 ("Whether denominated apparent author-

The majority's broader reading of *Grewe* disregards this precedent and its doctrinal foundations. It is true that, in doing so, the majority is not alone—other states have similarly expansive ostensible-agency rules in the hospital setting. See, e.g., *Sword v NKC Hosps Inc*, 714 NE2d 142, 152 (Ind, 1999) ("[A] hospital will be deemed to have held itself out as the provider of care unless it gives notice to the patient that it is not the provider of care and that the care is provided by a physician who is an independent contractor and not subject to the control and supervision of the hospital."). But when the act-or-neglect requirement is watered down to this level, courts are not truly applying the underlying legal doctrines. Cf. *Hospital Liability for the Right Reasons*, 42 Seton Hall L Rev at 1359 ("Simply stated, courts are not being true to the tests that they purport to rely on."). Instead, the courts are engaged in a policy-based reallocation of liability to hospitals. *Id*. at 1348 ("Relaxation of the representation requirement reflects the beginnings of a result-oriented approach towards hospital liability. Presumptive findings of hospital representation have undoubtedly eased the burden of persuasion that aggrieved plaintiffs carry, and, importantly, this practice suggests judicial approval of hospital liability in certain circumstances."); see generally *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435, 444 (1994) (noting the policy groundings of its holding).

A hospital that simply operates an emergency room has not necessarily done anything or failed to do anything that would mislead or take advantage of a patient's apparent misunderstanding. Under the rule adopted today, "the hospital is liable simply because it has independent contractors working in the emergency room located in the physical building owned by the hospital; that is, based simply on the fact that the hospital provides the space in which the nonemployee physician exercises independent medical judgment." *Popovich v Allina Health Sys*, 946 NW2d 885, 901 (Minn, 2020) (Anderson, J., dissenting); *Clark v Southview Hosp & Family Health Ctr*, 68 Ohio St 3d 435, 446 (1994) (Moyer, C.J., dissenting) (asserting that the broad view of ostensible agency "make[s] a hospital the virtual insurer of its independent physicians"). The dissent in *Popovich* posited that the rule effectively extends liability to all who receive treatment and thus represents "either strict liability or a close relative of strict liability." *Popovich*, 946 NW2d at 901 (Anderson, J., dissenting).[6]

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ity or ostensible authority (when the two words are treated as synonyms), this authority arises when the principal by its outward manifestations creates the impression in third parties that the agent possesses authority, despite the fact that the principal has not expressly or impliedly granted the agent the authority in question; or when the principal permits the agent to conduct itself in a certain way, leading third parties to believe that the agent possesses authority.").

[6] It is also worth pointing out that this extension of liability occurs for the provision of services that hospitals are mandated to provide. See 42 USC 1395dd.

The rule, therefore, comes down to a policy preference for insuring plaintiffs against loss, not an honest application of estoppel principles. But it has long been noted that an implied agency "cannot arise from any mere argument as to the convenience, utility or propriety of its existence." Mechem, A Treatise on the Law of Agency (1889), § 85, p 62. Thus, hospitals will now be forced to incur liability for the acts of nonemployees unless they somehow dispel a patient's presumptive belief about agency, which as noted below will be a difficult task.

C

Because it hides behind its reading of *Grewe*, the majority avoids examining the policy grounds for its ruling. As a matter of pure policy, it is not at all clear that the majority's rule is appropriate or wise. One of the main reasons for imposing vicarious liability on employers is that they have the power to supervise their agents. That control is absent with independent contractors. "The principal does not supervise the details of the independent contractor's work and is therefore less likely to be able to make him work safely than to make an employee work safely." Posner, Economic Analysis of Law (7th ed), p 189; see generally *Laster v Henry Ford Health Sys*, 316 Mich App 726, 735 (2016) ("In an agency relationship, it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability. Conversely, it is this absence of control that explains why an employer is generally not liable for the actions of an independent contractor.") (citation omitted). It therefore is "anomalous" for hospitals to be required to reimburse patients for wrongs committed by physicians over whom the hospital had no control. Note, *The Ostensible Agency Doctrine: In Search of the Deep Pocket?*, 57 UMKC L Rev 917, 930 (1990).

In addition, the majority's near-universal extension of ostensible agency in the emergency-room setting appears unnecessary. Physicians staffing the hospital can be sued directly and will likely have sufficient resources or insurance to make the plaintiff whole. See Epstein & Sykes, *The Assault on Managed Care: Vicarious Liability, ERISA Preemption, and Class Actions*, 30 J Legal Stud 625, 639 (2001); Comment, *Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency Doctrine in Ohio*, 56 U Cin L Rev 711, 736 (1987). The main effect of the rule adopted today, then, will likely relate to the allocation of risk between the doctor and the hospital rather than the plaintiff and defendants. If the hospital is forced to pay first, it might seek indemnity from the offending doctor, or it might be reluctant to sue its independent contractors. *Hospital Vicarious Liability*, 56 U Cin L Rev at 736-737. In any event, the plaintiff will have already been compensated, and the primary upshot will be this subsequent satellite litigation.[7]

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[7] There may be more appropriate approaches to making the hospital pay. See generally *Baptist Mem Hosp Sys v Sampson*, 969 SW2d 945, 949 (Tex, 1998) ("A patient injured by a physician's malpractice is not

Finally, it is worth noting the clear path the majority has embarked upon today and where it will lead. The majority has essentially made hospital liability in these cases the default rule unless a patient's belief in an agency relationship "is . . . dispelled in some manner by the hospital . . . ." Under this regime, hospitals are now encouraged to somehow communicate, before treatment, the employment status of hospital staff to patients seeking emergency care or their representatives. It is not clear whether delaying treatment to provide this information would even be medically ethical let alone efficacious in helping distressed patients decide whether to seek treatment at the hospital. Code of Ethics for Emergency Physicians, 70 Annals of Emergency Medicine 1, E7-E15 (July 1, 2017) ("Emergency physicians shall communicate truthfully with patients and secure their informed consent for treatment, unless the urgency of the patient's condition demands an immediate response or another established exception to obtaining informed consent applies.").[8]

In any event, it seems likely that hospitals' best efforts to educate their patients will come to naught, legally speaking. As one commentator observed, other states with similar rules "have continually disregarded hospitals' attempts to educate patients through the use of admission forms that indicate that treating physicians are not employees of the institution." *Hospital Liability for the Right Reasons*, 42 Seton Hall L Rev at 1356-1357. Although these actions, like notices on admission forms, should theoretically suffice, "courts have often found hospital notice to be artificial and therefore insufficient to immunize the institution from the actions of its physicians." *Id*. at 1357; see also *id*. ("Modern judicial treatment of this 'notice' issue is reflective of the judiciary's reaction to societal expectations compelling hospital accountability."). One wonders whether such notices will meet a similar fate in our state.

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without a remedy. The injured patient . . . may retain a direct cause of action against the hospital if the hospital was negligent in the performance of a duty owed directly to the patient."). Some courts have recognized a cause of action against a hospital "for its own negligence in selecting and retaining nonemployee physicians for staff privileges or as independent contractors . . . ." *Hospital Vicarious Liability*, 56 U Cin L Rev at 712; see also Vernia, *Tort Claim for Negligent Credentialing of Physician*, 98 ALR 5th 533 (discussing caselaw addressing "the tort of negligent credentialing of, or the negligent granting of staff privileges to, independent physicians").

[8] Available at <https://www.annemergmed.com/article/S0196-0644(17)30328-1/fulltext> (accessed November 17, 2022) [https://perma.cc/7YD9-8ARE].

III

Under the guise of simply interpreting *Grewe*, the majority today overrules decades of Court of Appeals precedent and creates a new rule that promises to vastly expand hospital liability. I would not disturb the law in this manner. Instead, I would affirm the Court of Appeals' articulation of the ostensible-agency rule—which we tacitly endorsed in *Reeves*—as requiring the hospital to engage in some act or neglect beyond simply operating an emergency room.

Applying the appropriate test, the Court of Appeals reached the proper result. In the Court of Appeals, it appears that plaintiff based her case on the physician's (Dr. Lonappan's) lab coat and Dr. Lonappan's testimony on how she greeted patients. In this Court, she focuses more on the hospital's conduct in being open to the public for the provision of healthcare.

As an initial matter, I agree with the Court of Appeals' treatment of the specific argument before it. The lab coat did not just bear defendant hospital's name but also that of Dr. Lonappan's employer, Hospital Consultants. Dr. Lonappan testified that she was wearing her credentials that indicated her connections with defendant and Hospital Consultants.[9]

With regard to plaintiff's argument that the relevant conduct here is simply operating a hospital for the public, I would reject this argument for the reasons above. There is no indication that defendant told anything to plaintiff specifically that would have led her to reasonably believe an agency relationship existed. There is no indication that defendant knew that plaintiff was operating under such a belief and yet failed to clarify the true state of affairs. And plaintiff has presented no evidence that defendant advertised itself as employing the doctors who provide care.[10] Plaintiff testified that she could not even recall Dr.

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[9] And further, I question whether the evidence of the lab coat and Dr. Lonappan's testimony is even very relevant under a liberal reading of *Grewe*, which said that "the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems." *Grewe*, 404 Mich at 251. What plaintiff might have seen on Dr. Lonappan's lab coat and what Dr. Lonappan might have said to plaintiff would not bear upon her expectations when she arrived at the hospital on the previous day. As noted above, Dr. Lonappan did not see plaintiff until the day after her admission.

[10] Finally, it is noteworthy that plaintiff *works* for the Beaumont Hospital system as a nurse. At the time of events here, she had been in her current position for 17 years and at Beaumont for 30. Despite her testimony to the contrary, it is hard to imagine that a reasonable person

Lonappan—it is difficult to see how she had any reasonable belief about Dr. Lonappan's employment relations with defendant.[11]

IV

For these reasons, I believe the Court of Appeals reached the correct result and I would affirm its holding.[12] In reversing the decision below, the majority today has upended yet another area of settled law. I therefore dissent.

CLEMENT, C.J., and ZAHRA, J., join the statement of VIVIANO, J.

PEOPLE v BOILEAU, No. 164376; Court of Appeals No. 360246. By order of July 28, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the March 29, 2022 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this

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in these circumstances would not know that physicians at hospitals were often independent contractors.

[11] Even under the majority's standard, the Court of Appeals on remand will likely need to determine whether there was a preexisting relationship between plaintiff and Dr. Lonappan. In this regard, the Court on remand will need to consider whether such a relationship could be said to exist here—Dr. Lonappan was not assigned freely by defendant hospital, she was assigned pursuant to the direction given by plaintiff's preexisting physician. In other words, plaintiff's care at the emergency room was arranged or directed by her preexisting physician. This arguably could suffice to preclude liability under the majority's new standard.

[12] Because of this conclusion, I would not address defendant's alternative argument that reliance on the hospital's act or omission is required and plaintiff here has failed to demonstrate it. This issue might arise on remand to the Court of Appeals, which should consider this Court's pre-*Grewe* caselaw discussed above to determine whether reliance is required. This Court has stated, in *David Stott Flour Mills v Saginaw Co Farm Bureau*, 237 Mich 657 (1927), that the person relying on the apparent agency relationship must do so " 'in good faith and in the exercise of reasonable prudence.' " *Id*. at 662 (citation omitted). This requirement proved determinative to the issue, as we cited it and the relevant evidence to conclude that "plaintiff was not entitled to a peremptory instruction that defendant was estopped from denying the authority of [the putative agent] to bind it." *Id*. In *Grewe* itself, one of the three requirements is that " 'the third person [i.e., the patient] relying on the agent's apparent authority must not be guilty of negligence.' " *Grewe*, 404 Mich at 253 (citation omitted).

case to the Shiawassee Circuit Court first for ministerial correction of the defendant's Presentence Investigation Report. Specifically, the April 8, 2021 conviction that is described as a "Delivery/Manufacture Methamphetamine" offense should be changed to a "Delivery/Manufacture Cocaine" offense. Second, we VACATE the award of $7,553 in restitution as to Ms. Cox and Ms. Paling, and REMAND for the court to articulate evidentiary support for a restitution award for each victim. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v LOCKMILLER, No. 164505; Court of Appeals No. 356217. By order of September 6, 2022, the prosecuting attorney was directed to answer the application for leave to appeal the April 14, 2022 judgment of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals declining to address the defendant's challenges to the trial court's imposition of lifetime electronic monitoring (LEM) as beyond the scope of the remand. On the defendant's first appeal, the Court of Appeals did not merely remand to the trial court with instructions to correct a scoring error for Offense Variable 7; rather, it vacated the original sentence and remanded for resentencing. By vacating the defendant's original sentence and remanding for resentencing, "the case was before the trial court in a presentence posture, allowing for objection to any part of the new sentence." *People v Rosenberg*, 477 Mich 1076 (2007). Therefore, when the trial court imposed LEM at the resentencing, the defendant was free to raise his challenges to this part of the sentence on an appeal of right.

We REMAND this case to the Court of Appeals to consider those issues the defendant raised in that court challenging the imposition of LEM. We do not retain jurisdiction.

Oral Argument Ordered on the Application for Leave to Appeal December 7, 2022:

In re HOLBROOK, No. 164489; Court of Appeals No. 359504. The parties shall file supplemental briefs in accordance with MCR 7.312(E) addressing whether: (1) the Oakland Family Court correctly assumed jurisdiction over the minor child pursuant to MCL 712A.2(b)(1) under the circumstances of this case; (2) *In re Hockett*, *Minor*, 339 Mich App 250 (2021), was correctly decided; and (3) the family court in this case should have assumed jurisdiction over the child pursuant to MCL 712A.2(b)(3)(A). No extensions shall be granted absent a showing of good cause.

The Children's Law Section and the Family Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 7, 2022:

PEOPLE v JUSTIN JOHNSON, No. 163958; Court of Appeals No. 350055.

PEOPLE v BUCHNER, No. 164062; Court of Appeals No. 351701.

GAVRILIDES MANAGEMENT COMPANY, LLC v MICHIGAN INSURANCE COMPANY, No. 164166; reported below: 340 Mich App 306.

PEOPLE v MIETTINEN, No. 164304; Court of Appeals No. 359990.

PEOPLE v DENEAL SMITH, No. 164390; Court of Appeals No. 353734.

YARBER v HOME-OWNERS INSURANCE COMPANY, No. 164474; Court of Appeals No. 357197.

PEOPLE v NORFLEET, No. 164480; Court of Appeals No. 359807.

PEOPLE v ALWAILY, No. 164525; Court of Appeals No. 358258.

THREE WON THREE CORP v PROPERTY-OWNERS INSURANCE COMPANY, No. 164565; Court of Appeals No. 356791.

GOURMET DELI REN CEN, INC v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 164578; Court of Appeals No. 357386.

LARSEN v VISION QUEST CONSULTINGS, INC, No. 164630; Court of Appeals No. 353440.

PEOPLE v KEYLOR, No. 164634; Court of Appeals No. 361261.

AUTO-OWNERS INSURANCE COMPANY v AUTO CLUB INSURANCE GROUP, No. 164667; Court of Appeals No. 359986.

HASTINGS MUTUAL INSURANCE COMPANY v AAA, No. 164670; Court of Appeals No. 359987.

PEOPLE v HOSKINS, No. 164680; reported below: 342 Mich App 194.

Summary Disposition December 9, 2022:

PEOPLE v HICKS, No. 160392; Court of Appeals No. 349843. By order of July 16, 2021, the application for leave to appeal the September 10, 2019 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022). We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without

parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I respectfully dissent and would deny leave to appeal.

PEOPLE v JOHNATHAN THOMAS, No. 160670; Court of Appeals No. 348984. By order of July 16, 2021, the application for leave to appeal the September 24, 2019 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022). The motion to remand the case to the trial court for an evidentiary hearing is DENIED. We do not retain jurisdiction.

VIVIANO, J. (*concurring in part and dissenting in part*). I concur in the denial of the motion to remand to the trial court for an evidentiary hearing. But for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I respectfully dissent from the order remanding to the Court of Appeals and would instead deny leave to appeal on this issue.

PEOPLE v SEAN YOUNG, No. 160756; Court of Appeals No. 350335. By order of September 22, 2021, the application for leave to appeal the November 20, 2019 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I dissent from the part of this Court's order remanding the case for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave under MCR 6.508(D).

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). Even if defendant could overcome the procedural bar, for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I respectfully dissent and would deny leave to appeal.

PEOPLE v CONNER, No. 160940; Court of Appeals No. 343286. By order of October 8, 2021, the application for leave to appeal the December 17, 2019 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Parks* (Docket No. 162086) and *People v Poole* (Docket No. 161529). On order of the Court, *Parks* having been decided on July 28, 2022, 510 Mich 225 (2022), and *Poole* having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, VACATE the sentence of the Oakland Circuit Court, and REMAND this case to that court for resentencing. The defendant's mandatory sentence of life without parole for first-degree murder, committed when he was 18 years old, is cruel or unusual punishment in violation of Const 1963, art 1, § 16. *Parks*, 510 Mich at 232. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

PEOPLE v ALLEN, No. 160962; Court of Appeals No. 351347. By order of July 16, 2021, the application for leave to appeal the January 24, 2020 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022). The motion to remand and for appointment of an expert is DENIED. We do not retain jurisdiction.

VIVIANO, J. (*concurring in part and dissenting in part*). I concur in the denial of the motion to remand and for appointment of an expert. But for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I respectfully dissent from the order remanding to the Court of Appeals and would instead deny leave to appeal on this issue.

PEOPLE v HOLLAND, No. 161004; Court of Appeals No. 350440. By order of July 16, 2021, the application for leave to appeal the January 16, 2020 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of

granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). The motion to remand for an evidentiary hearing is DENIED. We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I dissent from the part of this Court's order remanding the case for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave under MCR 6.508(D).

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). Even if defendant could overcome the procedural bar, for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I respectfully dissent and would deny leave to appeal.

PEOPLE v DONALD FLOWERS, No. 161447; Court of Appeals No. 352965. By order of October 8, 2021, the application for leave to appeal the May 1, 2020 order of the Court of Appeals was held in abeyance pending the decisions in *People v Parks* (Docket No. 162086) and *People v Poole* (Docket No. 161529). On order of the Court, *Parks* having been decided on July 28, 2022, 510 Mich 225 (2022), and *Poole* having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *Parks* and *People v Stovall*, 510 Mich 301 (2022). We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I dissent from the part of this Court's order remanding the case for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave under MCR 6.508(D).

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). Even if defendant could overcome the procedural bar, for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I respectfully dissent and would deny leave to appeal.

PEOPLE v WATKINS, No. 161733; Court of Appeals No. 352899. By order of August 3, 2021, the application for leave to appeal the June 9, 2020 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the motion to add issue is GRANTED. *Poole* having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). Even if defendant could overcome the procedural bar, for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I respectfully dissent and would deny leave to appeal.

PEOPLE v DESEAN SMITH, No. 161826; Court of Appeals No. 345048. By order of March 16, 2022, the application for leave to appeal the June 18, 2020 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Parks* (Docket No. 162086) and *People v Poole* (Docket No. 161529). On order of the Court, *Parks* having been decided on July 28, 2022, 510 Mich 225 (2022), and *Poole* having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, VACATE the sentence of the Oakland Circuit Court, and REMAND this case to that court for resentencing. The defendant's mandatory sentence of life without parole for first-degree murder, committed when he was 18 years old, is cruel or unusual punishment in violation of Const 1963, art 1, § 16. *Parks*, 510 Mich at 232. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

PEOPLE v LAWSON, No. 162150; Court of Appeals No. 354113. By order of July 9, 2021, the application for leave to appeal the August 25, 2020 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals

for consideration as on leave granted in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). The motion to vacate the judgment of sentence is DENIED. We do not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). While I concur in the denial of the motion to vacate the judgment of sentence, I dissent from the part of this Court's order remanding the case for consideration as on leave granted in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave under MCR 6.508(D).

VIVIANO, J. (*concurring in part and dissenting in part*). I concur in the denial of the motion to vacate the judgment of sentence. But for the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). Even if defendant could overcome the procedural bar, for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I respectfully dissent from the order remanding to the Court of Appeals.

PEOPLE v ADAMOWICZ, No. 162170; Court of Appeals No. 330612. By order of September 22, 2021, the application for leave to appeal the September 3, 2020 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part IV of the June 22, 2017 judgment of the Court of Appeals, and we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). I dissent from the part of this Court's order vacating the judgment of the Court of Appeals and remanding the case to that court for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave on all the issues raised in defendant's application.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory

sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

PEOPLE v DEAN, No. 162459; Court of Appeals No. 354605. By order of August 3, 2021, the application for leave to appeal the December 10, 2020 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I dissent from the part of this Court's order remanding the case for consideration as on leave granted in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave under MCR 6.508(D).

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). But even if defendant could overcome the procedural bar, for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I respectfully dissent.

PEOPLE v LARNELL JOHNSON, No. 162797; Court of Appeals No. 353087. By order of October 8, 2021, the application for leave to appeal the February 2, 2021 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). We do not retain jurisdiction.

VIVIANO, J. (*dissenting*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was 18 years old is unconstitutional. Therefore, I respectfully dissent and would deny leave to appeal.

PEOPLE v MARCO TAYLOR, No. 163270; Court of Appeals No. 354823. By order of January 4, 2022, the application for leave to appeal the March 3, 2021 order of the Court of Appeals was held in abeyance pending the decisions in *People v Poole* (Docket No. 161529) and *People v Parks* (Docket No. 162086). On order of the Court, *Parks* having been decided on July 28, 2022, 510 Mich 225 (2022), and *Poole* having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted in light of *Parks*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). I dissent from the part of this Court's order remanding the case for consideration as on leave granted in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave on all the issues raised in defendant's application.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

PEOPLE v CZARNECKI, No. 163369; Court of Appeals No. 348732. By order of January 4, 2022, the application for leave to appeal the June 10, 2021 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Parks* (Docket No. 162086) and *People v Poole* (Docket No. 161529). On order of the Court, the motion to accept the amended Standard 4 brief is GRANTED. *Parks* having been decided on July 28, 2022, 510 Mich 225 (2022), and *Poole* having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration of whether the defendant's mandatory sentence of life without parole for a murder committed at the age of 19 is cruel or unusual punishment under Const 1963, art 1, § 16. See *Parks*, 510 Mich at 232. In all other respects, leave to appeal is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). I dissent from the part of this Court's order remanding the case for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not

entitled to relief under *Parks*. Therefore, I would deny leave on all the issues raised in defendant's application.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

PEOPLE V DOMINICK WILLIAMS, No. 163564; Court of Appeals No. 352302. On order of the Court, the application for leave to appeal the July 29, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals judgment reversing the defendant's sentence, and we REMAND this case to that court for reconsideration of that issue in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). I dissent from the part of this Court's order that remands this case for reconsideration in light of *People v Parks*, 510 Mich 225 (2022) (holding that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders) and *People v Stovall*, 510 Mich 301 (2022) (holding that Const 1963, art 1, § 16 bars parolable life sentences for juvenile homicide offenders). Defendant was 18 years old when he committed acts leading to his first-degree criminal sexual conduct (CSC-I) conviction, which mandates a 25-year minimum sentence, see MCL 750.520b(2)(b). Because nothing in *Parks* or *Stovall* places into doubt the constitutionality of a 25-year mandatory minimum sentence for 18-year-old offenders convicted of CSC-I, I would deny leave on all the issues raised in defendant's application.[1]

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), and Justice ZAHRA's dissent in *People v Stovall*, 510 Mich 301, 332-362 (2022), I do not believe the majority in those cases properly applied the test for determining whether a sentence is constitutionally proportionate that this Court established in *People v Lorentzen*, 387 Mich 167 (1992), and *People v Bullock*, 440 Mich 15 (1992). I would not remand this case to the

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[1] Also, for the reasons stated in my dissent in *Stovall*, 510 Mich at 338 n 24, 343 n 25 (ZAHRA, J., dissenting), I would revisit our caselaw interpreting Const 1963, art 1, § 16—specifically whether Article 1, § 16 provides greater protection than the Eighth Amendment and whether Article 1, § 16 contains a proportionality guarantee.

Court of Appeals for reconsideration in light of what I believe are flawed analyses of the *Lorentzen/Bullock* test. Furthermore, for the reasons stated in *Stovall*, 510 Mich at 338 n 24, 343 n 25 (ZAHRA, J., dissenting), I believe that in an appropriate future case, we should revisit our caselaw interpreting Const 1963, art 1, § 16 holding (1) that the provision provides greater protection than the Eighth Amendment of the U.S. Constitution and (2) that the provision contains a proportionality component. I respectfully dissent from the order remanding this case to the Court of Appeals but concur in the denial of leave in all other respects.

PEOPLE v WALTER JONES, No. 163600; Court of Appeals No. 357505. By order of January 31, 2022, the application for leave to appeal the August 13, 2021 order of the Court of Appeals was held in abeyance pending the decision in *People v Poole* (Docket No. 161529). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 851 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted in light of *People v Parks*, 510 Mich 225 (2022), and *People v Stovall*, 510 Mich 301 (2022). We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I dissent from the part of this Court's order remanding the case for consideration as on leave granted in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave under MCR 6.508(D).

VIVIANO, J. (*dissenting*). For the reasons stated in my dissent in *People v Stovall*, 510 Mich 301, 362-368 (2022), I do not believe defendant has overcome the procedural bar to file a successive motion for relief from judgment and would deny leave to appeal under MCR 6.502(G). But even if defendant could overcome the procedural bar, for the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I respectfully dissent.

PEOPLE v RICHARDS, No. 163892; Court of Appeals No. 353247. On order of the Court, the application for leave to appeal the September 2, 2021 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part II of the judgment of the Court of Appeals, VACATE the sentence of the Berrien Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a

disproportionate sentence. *People v Taylor*, 510 Mich 112 (2022). Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent from the order vacating in part the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

PEOPLE V RUSH, No. 164145; Court of Appeals No. 353182. On order of the Court, the application for leave to appeal the January 13, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for reconsideration in light of *People v Parks*, 510 Mich 225 (2022). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). I dissent from the part of this Court's order remanding the case for reconsideration in light of *People v Parks*, 510 Mich 225 (2022), which held that Const 1963, art 1, § 16 bars mandatory life-without-parole sentences for 18-year-old homicide offenders. Because defendant was over the age of 18 at the time he committed first-degree murder, he is not entitled to relief under *Parks*. Therefore, I would deny leave on all the issues raised in defendant's application.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Chief Justice CLEMENT's dissent in *People v Parks*, 510 Mich 225, 278-300 (2022), I do not believe that a mandatory sentence of life without parole for a defendant who committed first-degree murder when he was over the age of 17 is unconstitutional. Therefore, I would deny leave to appeal on all of the issues raised by defendant.

BUTTERS V BUTTERS, No. 164888; reported below: 342 Mich App 460. On order of the Court, the application for leave to appeal the July 28, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals. The Court of Appeals correctly explained that, on remand, the trial court " 'should consider up-to-date information, including the children's current and reasonable preferences' " when determining whether a modification of the previous

custody order is warranted. *Butters v Butters*, 342 Mich App 460, 472 (2022), quoting *Fletcher v Fletcher*, 447 Mich 871, 889 (1994). However, the Court of Appeals erred by instructing the Kent Circuit Court on remand to apply the best-interest factors under the clear-and-convincing-evidence standard without regard to any changed circumstances that might have occurred during the pendency of this appeal. When nonharmless errors occur in child custody cases that necessitate a remand to the circuit court for reevaluation, those courts should address the circumstances of the child as they exist at the time of remand. See *O'Brien v D'Annunzio*, 507 Mich 976 (2021); *Fletcher*, 447 Mich at 889; *Dempsey v Dempsey*, 409 Mich 495, 496 (1980).

On remand, when addressing the issues remanded by the Court of Appeals, we DIRECT the Kent Circuit Court to reevaluate the children's established custodial environments based upon up-to-date information in existence at the time of the evidentiary hearing. If the circuit court concludes that the children have established custodial environments with plaintiff or with both parents at the time of the hearing on remand, then "[t]he court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). See also *Foskett v Foskett*, 247 Mich App 1, 5-6 (2001). We further direct the circuit court to expedite its consideration and resolution of this case. We do not retain jurisdiction.

Leave to Appeal Granted December 9, 2022:

TECHNICAL PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN v RENNER, No. 162601; reported below: 335 Mich App 293. On October 13, 2022, the Court heard oral argument on the application for leave to appeal the January 7, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) what is the difference between the common-law analysis of the duty of fair representation and the statutory analysis of "coercion" and "restraint" under the public employment relations act (PERA), MCL 423.201 *et seq*., and whether the outcome in this case will differ based on which analysis is used; (2) whether the fee schedule in this case violates §§ 9 and 10 of PERA (MCL 423.209; MCL 423.210); and (3) whether the fee schedule in this case violates the common-law duty of fair representation. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Amici who appeared at the application stage (American Federation of State, County, and Municipal Employees; Michigan Education Association; Michigan State AFL-CIO; American Federation of Teachers; Mackinac Center for Public Policy; National Right to Work Legal Defense Foundation, Inc.) are invited to file supplemental briefs amicus curiae. The State Bar of Michigan Government Law Section and State Bar of Michigan Labor Law Section are invited to file briefs amicus

curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal December 9, 2022:

PEOPLE v MARQUIS NELSON, No. 164307; Court of Appeals No. 353548. The parties shall file supplemental briefs in accordance with MCR 7.312(E) addressing: (1) whether the Court of Appeals correctly held that only Officer Mikael Ziegler exceeded the scope of permissible drug profile testimony, and that Sergeant Kurt Roth did not; and (2) whether the Court of Appeals correctly applied the prejudice prongs of the analyses for plain error, see *People v Carines*, 460 Mich 750, 763-764 (1999), and ineffective assistance of counsel, see *Strickland v Washington*, 466 US 668, 694-695 (1984).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

The motion to file in pro per supplement is GRANTED.

Leave to Appeal Denied December 9, 2022:

PEOPLE v DEONTON ROGERS, No. 163588; reported below: 338 Mich App 312. By order of February 4, 2022, the application for leave to appeal the August 5, 2021 judgment of the Court of Appeals was held in abeyance pending the decision in *Rouch World, LLC v Dep't of Civil Rights* (Docket No. 162482). On order of the Court, the case having been decided on July 29, 2022, 510 Mich 398 (2022), the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*). I dissent from the Court's denial order in this case, which involves the shooting of a transgender individual. I would instead grant leave to decide the important questions raised by this case.

Defendant was charged under MCL 750.147b(1)(a). That statute states in relevant part:

> (1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
>
> (a) Causes physical contact with another person.

* * *

> (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

The circuit court quashed the charge for two alternative reasons: (1) the term "gender" does not apply to transgender individuals, and (2) defendant never "caused" physical contact—as alleged in the complaint, the victim initiated contact by grabbing defendant's hand that held the gun. After the Court of Appeals affirmed, we remanded for reconsideration in light of *Bostock v Clayton Co, Georgia*, 590 US 644 (2020). *Bostock* held that Title VII of the Civil Rights Act—making it unlawful to "discriminate against any individual with respect to [employment matters] because of such individual's . . . sex," 42 USC 2000e-2(a)(1)—applied to discrimination against homosexual and transgender individuals. *Bostock*, 590 US at 653. Relying on *Bostock* here, the Court of Appeals reversed on remand, determining that while the term "gender" did not encompass gender identity, discrimination on the basis of gender identity will always involve discrimination on the basis of "gender." Further, with regard to the physical-contact requirement, the Court of Appeals noted that the statute does not require a defendant to initiate the contact. It was sufficient that defendant brandished his gun and threatened the victim, thus leading to the struggle.

After the Court of Appeals issued its decision, this Court adopted *Bostock* for purposes of our civil rights law in *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398 (2022). The Court held that the prohibition of discrimination "because of . . . sex" in the Elliott-Larsen Civil Rights Act necessarily "encompasses discrimination on the basis of sexual orientation." *Id*. at 404. The Court did not address whether the statute was applicable to transgender individuals. I dissented because the statutory language "requires that the defendant maintain some prejudice, bias, animus, or belief about 'sex' or the other characteristics protected by the statute." *Id*. at 467 (VIVIANO, J., dissenting).

I would grant leave in the present case to determine whether MCL 750.147b(1)(a) applies to transgender individuals. Arguably, this presents a somewhat closer question than *Rouch World* because discrimination against transgender individuals might be seen to relate to those individuals' "gender" and thus fall within the statute. On the other hand, under the reasoning of my dissent in *Rouch World*, it is not clear that discrimination against a transgender individual could be said to arise from animus against one gender or the other, i.e., animus or prejudice against men as men or women as women. I would also grant leave to determine whether defendant caused contact under the statute. This represents another close question that this Court should address. While the Court of Appeals is correct that the statute does not expressly require the defendant to initiate the contact, it is not clear when a defendant's conduct can be said to "cause" the victim to initiate contact, thus satisfying the statute. The lack of clarity and potential breadth of the statute requires this Court's close examination.

For these reasons, I dissent.

PEOPLE v BUNDY, No. 164180; Court of Appeals No. 349072.

BAILEY v ANTRIM COUNTY, No. 164463; reported below: 341 Mich App 411.

VIVIANO, J. (*concurring*). I concur in the Court's denial order because I believe the Court of Appeals properly rejected plaintiff's argument that he has a right to conduct an independent audit of election results under Const 1963, art 2, § 4(1)(h). That constitutional provision, which was added in 2018, states that "[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections." The precise contours of this new audit right are unclear and have never been addressed by this Court. As I have explained in the past, the language of this provision could ensure an audit that facilitates timely challenges to election results or allows for assessments of election procedures that lead to future improvement. *Costantino v Detroit*, 506 Mich 1041, 1045-1047 (2020) (VIVIANO, J., dissenting). The proper interpretation of the audit right represents a significant question that this Court should address. See *Johnson v Secretary of State*, 506 Mich 975, 984-985 (2020) (VIVIANO, J., dissenting); *Costantino*, 506 Mich at 1047 (VIVIANO, J., dissenting). The need for such guidance is especially important because our laws regulating challenges to election results are unclear. See *Johnson*, 506 Mich at 987 (VIVIANO, J., dissenting) (noting the "rampant confusion in our state concerning the proper mechanism for contesting elections in general, and presidential elections in particular, on the basis of fraud"). But whatever Const 1963, art 2, § 4(1)(h) means, it surely cannot be that each qualified elector can undertake his or her own separate audit of an election. The present case therefore does not offer the opportunity to add any clarity on this important topic. Accordingly, I concur.

Summary Disposition December 14, 2022:

MILMAN v FIEGER & FIEGER, PC, No. 165026; Court of Appeals No. 362334. On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the October 26, 2022 order of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the order of the Court of Appeals and the June 15, 2022 order of the Oakland Circuit Court, and REMAND this case to the Oakland Circuit Court for further proceedings consistent with this order. Because the parties are now in agreement that defendant Geoffrey Fieger should be able to represent himself at trial, there is no longer an actual controversy between adverse parties, and thus the appeal is now nonjusticiable. See *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920). The stay of trial court proceedings, ordered on September 30, 2022, is DISSOLVED.

Request for the Appointment of a Master Granted December 16, 2022:

IN THE MATTER OF DEMETRIA BRUE, JUDGE 36TH DISTRICT COURT, No. 165049. On order of the Court, the request by the Judicial Tenure Commission for the appointment of a Master is considered, and the Honorable Lita Popke is hereby appointed Master to hear Formal Complaint No. 105.

IN THE MATTER OF PAUL CUSICK, JUDGE 3RD CIRCUIT COURT, No. 165050. On order of the Court, the request by the Judicial Tenure Commission for the appointment of a Master is considered, and the Honorable Peter Houk is hereby appointed Master to hear Formal Complaint No. 104.

Leave to Appeal Denied December 16, 2022:

SCHAFF v FORBES, No. 163404; reported below: 338 Mich App 1. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we VACATE our order of March 23, 2022. The application for leave to appeal the July 1, 2021 judgment of the Court of Appeals is DENIED, because we are no longer persuaded that the questions presented should be reviewed by this Court.

FEAGIN v MOROSKI, No. 164517; Court of Appeals No. 356113.

WELCH, J. (*dissenting*). I disagree with the majority's denial of leave to appeal. Instead, I would have vacated the June 8, 2022 order of the Court of Appeals and remanded this case to that Court for consideration as on reconsideration granted with regard to defendant's arguments concerning his counterclaim for unjust enrichment. Plaintiff initiated a summary proceeding in district court against defendant to recover possession of a residential property in Detroit that had been conveyed by way of a fraudulent quitclaim deed. Defendant took possession of the property after acquiring a deed down the chain of title of the fraudulent deed, apparently without knowledge of the fraud. After receiving the deed, defendant allegedly changed the locks and made several repairs and improvements to the property following a fire. As a result, defendant filed a counterclaim seeking a money judgment for the increase in property value due to his improvements. He premised the counterclaim on two separate counts. In Count I, defendant alleged that he was "entitled to the increased fair market value his renovations caused to the property" under MCR 3.411(F)(1). In Count II, defendant alleged that, as a matter of equity, he was entitled to payment because plaintiff was "unjustly enriched by the value of the improvements [defendant] performed."

The parties stipulated to a consent judgment to confirm plaintiff's title to the property and entitlement to possession, which resolved plaintiff's summary proceeding. Defendant's counterclaims were severed and removed to circuit court. The circuit court granted plaintiff's motion for summary disposition to dispose of both counterclaims. The

court subsequently denied plaintiff's request for costs and attorney fees based, at least in part, on defendant's subjective belief that he was entitled to compensation.

Following plaintiff's appeal, the Court of Appeals vacated in part, reversed in part, and remanded for further proceedings. Specifically, the Court of Appeals vacated the denial of plaintiff's motion with respect to her request for costs and remanded for the circuit court to either award costs or provide an adequate reason in writing for declining to award costs. Regarding the request for attorney fees, the Court of Appeals reversed the circuit court's order to the extent it held that defendant's counterclaims were not frivolous and remanded for further proceedings. The Court of Appeals' analysis and reasoning, however, addressed only defendant's first counterclaim, which was premised on MCR 3.411(F)(1) and the law applicable to such a claim. The Court of Appeals subsequently denied defendant's motion for reconsideration, in which defendant argued that the Court of Appeals erroneously failed to separately consider whether his equitable claim for unjust enrichment was frivolous.

I believe it was an abuse of discretion for the Court of Appeals to deny reconsideration on this record. I agree with the Court of Appeals' holding regarding costs. But plaintiff sought attorney fees as a sanction under MCR 1.109(E)(7), MCR 2.625(A)(2), and MCL 600.2591, which requires a finding that defendant's counterclaims were frivolous. As the Court of Appeals acknowledged, " '[a] claim is not frivolous merely because the party advancing the claim does not prevail on it.' " *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 365 (2016) (citation omitted). I agree with the Court of Appeals' holding that defendant's claim premised on MCR 3.411(F)(1) was frivolous. That rule only applies to actions to quiet title brought in circuit court, and defendant's pleadings acknowledged that plaintiff did not file such an action. See MCR 3.411(A); MCL 600.2932(1). The same cannot be said for defendant's unjust enrichment counterclaim. The Court of Appeals' reasoning and the law it cited as to defendant's claim under MCR 3.411 (Count I) had no relevance to an independent equitable claim for unjust enrichment (Count II). A claim for unjust enrichment "is a cause of action to correct a defendant's unjust retention of a benefit owed to another," *Wright v Genesee Co*, 504 Mich 410, 417 (2019), and it "can arise when a party 'has and retains money or benefits which in justice and equity belong to another,' " *id*. at 418, quoting *McCreary v Shields*, 333 Mich 290, 294 (1952). The remedy is restitution. *Wright*, 504 Mich at 418.

Nothing in the Court of Appeals opinion explains why defendant's counterclaim for unjust enrichment was frivolous, such as being "devoid of arguable legal merit." MCL 600.2591(3)(a)(*iii*). In fact, the Court of Appeals did not address defendant's unjust enrichment claim at all despite its blanket ruling that plaintiff is entitled to sanctions because of defendant's pleading frivolous counterclaims. I believe defendant's motion for reconsideration demonstrated a "palpable error by which the

court and the parties have been misled," MCR 2.119(F)(3), and thus the Court of Appeals abused its discretion by denying reconsideration, MCR 7.215(I). I respectfully dissent.

PEOPLE v BATES, No. 165004; Court of Appeals No. 359200.

Summary Disposition December 21, 2022:

PEOPLE v SKINNER, No. 158924; Court of Appeals No. 317892. By order of September 22, 2021, the application for leave to appeal the November 13, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Taylor* (Docket No. 154994). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 112 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals judgment that is inconsistent with *Taylor*, VACATE the sentence of the St. Clair Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a disproportionate sentence. *Taylor*, 510 Mich 112. Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of her crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent from the order reversing in part the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

PEOPLE v HYATT, No. 159106; Court of Appeals No. 325741. By order of September 22, 2021, the application for leave to appeal the December 4, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Taylor* (Docket No. 154994). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 112 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals, VACATE the sentence of the Genesee Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing

evidence, that life without parole is a disproportionate sentence. *Taylor*, *supra*. Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent from the order vacating the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

JANETSKY v COUNTY OF SAGINAW, Nos. 161612 and 161613; Court of Appeals Nos. 346542 and 346565. On October 13, 2022, the Court heard oral argument on the application for leave to appeal the April 23, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals in part, and REMAND this case to that Court for consideration of the issues raised by defendants but not addressed by that court during its initial review.

The Court of Appeals erred by concluding that: (1) defendant Christopher Boyd is entitled to immunity from tort liability because there is no genuine issue of material fact concerning whether he acted in good faith, (2) plaintiff has not established a genuine issue of material fact that she engaged in protected activity under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., by reporting actual or suspected violations of the law, and (3) the WPA provides the exclusive remedy for plaintiff's public-policy claim.[1]

Regarding plaintiff's intentional-tort claims, a reasonable jury could conclude that Boyd's alleged conduct toward plaintiff lacked good faith and therefore he is not entitled to governmental immunity. See *Odom v Wayne Co*, 482 Mich 459, 480 (2008).[2] Plaintiff alleges that Boyd committed the intentional torts of assault/battery and false

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[1] With regard to the good-faith exception and plaintiff's WPA claim, a majority of the Court agrees to the holding and the rationale provided in this order. With regard to plaintiff's public-policy claim, a majority of the Court agrees that a remand to the Court of Appeals is warranted. On remand, the Court of Appeals shall assess whether plaintiff's public-policy claim is legally and factually supported.

[2] We share Chief Justice CLEMENT's skepticism as to whether the good-faith prong from *Odom* for individual governmental immunity should apply outside the context of a police officer or a public safety

arrest/imprisonment.[3] Boyd bears the burden "to raise and prove his entitlement to governmental immunity as an affirmative defense." *Id*. at 479. Boyd argues that he acted in good faith because he believed that his actions were an appropriate exercise of supervisory authority. He cites evidence that his treatment of plaintiff was consistent with his treatment of other attorneys in his office. However, plaintiff has presented evidence that Boyd, in fact, treated her differently than other attorneys in the office, and Boyd has not conclusively rebutted that evidence. Moreover, even assuming that Boyd's alleged conduct here was consistent with his personal management style, a jury could still conclude that he did not believe in good faith that this behavior was an appropriate exercise of his supervisory authority.

Regarding plaintiff's WPA claim, there was sufficient evidence that she reported actual or suspected violations of the law under MCL 771.1 and MCL 780.756(3). Whether there were actual violations of the law under these statutes is not dispositive, as the WPA also protects those who report *suspected* violations of the law. Plaintiff has presented sufficient evidence to create a question of fact that she suspected the law had been violated. For example, plaintiff drafted a motion, which was signed and filed by Boyd, requesting that the trial court set aside the sentencing agreement and allow the criminal defendant to withdraw his plea because the sentencing agreement was "unlawful" under MCL 771.1. Moreover, MCL 780.756(3) does not require consultation with victims generally but rather requires it "[b]efore finalizing any negotiation that may result in a . . . plea or sentence bargain . . . ." There is no evidence that the victims here were consulted during or in anticipation of the negotiations that resulted in the plea bargain eventually finalized, and a reasonable jury could conclude that plaintiff suspected this failure to consult violated MCL 780.756(3). Since there is a question of fact as to whether plaintiff reported suspected violations of the law under MCL 771.1 and MCL 780.756(3), we decline to address whether actual violations of the law occurred.

Finally, regarding plaintiff's public-policy claim, the WPA does not provide the exclusive remedy. Plaintiff's public-policy claim is factually distinct from her WPA claim and those factual allegations do not fall within the scope of conduct covered by the WPA. Plaintiff's WPA claim is based on reports to her supervisor of actual or suspected violations of the law in the entering of a plea and sentencing agreement. By contrast,

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officer. However, we decline to consider a categorical ruling on this issue here, given that such a holding is unnecessary to resolving this case and we did not seek or obtain briefing from the parties on this larger issue.

[3] Plaintiff did not appeal the Court of Appeals' holding that defendant Saginaw County is entitled to governmental immunity on her intentional-tort claims, nor did she appeal the trial court's dismissal of her claim for intentional infliction of emotional distress. Because the Court of Appeals did not address the issue, we do not decide whether plaintiff has sufficiently alleged or created a question of fact as to whether Boyd committed assault/battery or false arrest/imprisonment.

plaintiff's public-policy claim is based on her alleged refusal to violate the law—i.e., her attempt to set aside that plea and sentencing agreement. Further, the WPA governs only *reports* of violations or suspected violations of the law, and plaintiff's public-policy claim is not premised on such conduct. We express no opinion as to whether plaintiff's public-policy claim is otherwise legally or factually supported and leave that issue for further consideration on remand.

CLEMENT, C.J. (*concurring in part, concurring in the judgment in part, and dissenting in part*). I largely agree with the result the Court reaches today (albeit with one disagreement), and I join the reasoning of some portions of it.

First, as to plaintiff's intentional-tort claims, I join in full the Court's holding that "a reasonable jury could conclude that Boyd's alleged conduct toward plaintiff lacked good faith and therefore he is not entitled to governmental immunity." Indeed, I would go further. I do not believe the "good faith" standard we have used for the intentional torts of governmental employees is applicable in circumstances like these. We discussed this standard at some length in *Odom v Wayne Co*, 482 Mich 459, 473-475 (2008), but I believe in context it only properly applies to public officers who, because of their office, are authorized to commit acts that *would* be tortious if a private actor committed them. The cases cited in *Odom*—as well as *Odom* itself—are almost all cases involving suits against police officers or other public safety officials. And, by virtue of their office, these officials have a broader license to perform acts that would be torts if a private actor did them—but only if the official does them in good faith. Thus, as we held in *Firestone v Rice*, 71 Mich 377, 384 (1888), "[t]here must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender," the propriety of which should not "be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity." Here, nothing about the nature of the office of an assistant prosecutor gives the officeholder a license to commit intentional torts such as those alleged in this case against coworkers, and I therefore think that the "good faith" standard from *Odom* is simply inapplicable. That said, we have not had occasion to recognize this distinction before, so I do not fault the majority for relying on the *Odom* "good faith" standard in the instant case.

As to plaintiff's claims under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., I mostly agree with the result reached by the Court—resuscitating her WPA claim—although I disagree with its reasoning. The Court holds that "there was sufficient evidence that [plaintiff] reported actual or suspected violations of the law" because "[w]hether there were actual violations of the law under these statutes is not dispositive, as the WPA also protects those who report *suspected* violations of the law." This Court has never held this before, and in fact expressly declined to make such a holding in *Debano-Griffin v Lake Co*, 486 Mich 938 (2010). I think making such a holding today is misguided. The statute defines as protected activity a report of "a violation or a suspected violation of a law," MCL 15.362, but it does *not* protect

reporting a suspected violation of a *suspected* law. In other words, while the statute accepts uncertainty—a violation need only be *suspected* to be reportable and protected—this should be construed as *factual* uncertainty, not *legal* uncertainty. In other words, for a plaintiff to make a report that qualifies for WPA protection, the plaintiff need not know with certainty that the activity reported actually *occurred*, but the plaintiff *does* need to demonstrate that *if* those facts actually occurred, they would *definitely* be a violation of the law. To hold otherwise would allow plaintiffs to receive protection for reporting violations of imaginary laws, which I do not think the WPA contemplates—even if a reasonable person might believe such a law exists. To the extent it holds to the contrary, I disagree with *Melchi v Burns Int'l Security Servs, Inc*, 597 F Supp 575 (ED Mich, 1984), and it is not binding on this Court in any event.

As a result, I do not think this Court can avoid deciding whether the facts alleged by plaintiff would qualify as a violation of the law. She alleges that she reported to her superiors violations of MCL 780.756(3) and MCL 711.1(1). I agree with the outcome reached by the Court of resuscitating her WPA claim under MCL 780.756(3) because I believe what plaintiff alleges qualifies as a violation of the statute. It provides:

> Before finalizing any negotiation that may result in a dismissal, plea or sentence bargain, . . . the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the prosecution for the crime, including the victim's views about dismissal, plea or sentence negotiations . . . .

In this case, as it happens, the facts are essentially undisputed. While plaintiff was on honeymoon her supervisor entered into a plea agreement with a criminal defendant to plead the charges he faced for first-degree criminal sexual conduct (CSC) down to CSC-III and be sentenced to time in the county jail and probation. Her supervisor did not consult with the victim about this precise plea offer, but was aware that the victim would be opposed to the offer as the result of prior contact between the prosecutor's office and the victim. Plaintiff reported this lack of consultation to the county prosecutor, and she alleges that she has been retaliated against as a result.

Defendant argues that plaintiff's supervisor satisfied the statute—the victim was given an opportunity to consult, and that opportunity occurred before the plea was finalized. I believe we must decide whether or not this conduct satisfied the statute, rather than simply concluding that a reasonable person *could* conclude that it did not satisfy the statute. That said, I concur in the result of resuscitating plaintiff's WPA case under MCL 780.756(3) because I do not believe this is the consultation the statute contemplates. The statute requires that the prosecutor give the victim an opportunity to consult with the prosecutor over "the victim's views about dismissal, plea or sentence negotiations," but to offer any sort of knowledgeable or informed consultation, the plea negotiations would need to be far enough along that the victim is reacting to an actual offer. Any other rule would essentially punish

victims who have clear, categorical preferences—e.g., "no pleas," or "defendant must go to prison"—by relieving the prosecutor of the obligation to consult under the statute once those preferences are communicated.[1] I believe the facts that plaintiff reported qualify as a violation of MCL 780.756(3).

On the other hand, I dissent from the Court's decision to resuscitate plaintiff's WPA claim under MCL 771.1(1). That statute allows a court to "place the defendant on probation," but only in "prosecutions for felonies . . . *other than* . . . criminal sexual conduct in the first or third degree[.]" Plaintiff alleges that this statute was violated in that the defendant in the underlying criminal case was convicted of CSC-III but negotiated a sentence that included probation. However, the WPA only protects an employee who "reports or is about to report . . . a violation or a suspected violation of a law[.]" MCL 15.362. I do not think a defective criminal sentence is susceptible to being "reported." While exactly what qualifies as a "report" is a disputed issue that this Court is going to be taking up in the coming months, see *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 510 Mich 952 (2022), regardless of the interpretation we arrive at for "report" I do not think it encompasses matters of public record, which this plea bargain was. The public is charged with constructive notice of the contents of these judgments, and I do not see how we can say that plaintiff "reported" something to the county prosecutor that he already is treated as having full knowledge of. Undoubtedly, the Michigan Compiled Laws have any number of obscure legal requirements that we are all still bound to follow because they are published in the books and we have constructive notice of them. The same principle applies here.

All that said, I concur with the Court's resuscitating plaintiff's common-law claim for termination in violation of public policy, because I believe that MCL 771.1(1) is the basis for that claim for essentially the converse of the reasons that it cannot be the basis of a claim under the WPA. Because I do not believe that a violation of MCL 771.1(1) is susceptible to being "reported," the WPA does not protect plaintiff's communications regarding MCL 771.1(1) and therefore it cannot provide an exclusive remedy where it provides no remedy at all. But that does not change the reality that MCL 771.1(1) is a formal legislative expression of the state's public policy, which it presumably prefers to see obeyed. To the extent that plaintiff can demonstrate that defendants

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[1] I disagree with Justice ZAHRA's assertion that MCL 780.756(3) "simply requires that the victim of a crime be given the opportunity to express his or her views on the disposition of the prosecution before any negotiations are finalized." The Legislature's choice of the word "finalize" is important. It is defined as "[t]o put into final form; complete." *The American Heritage Dictionary of the English Language* (5th ed). It seems apparent to me that what the Legislature contemplated was that finalization was the *only* thing that remained to be done—i.e., that the negotiations were far enough along that all that remained was to put the plea "into final form."

retaliated against her as a result of her efforts to bring the underlying criminal prosecution into compliance with MCL 771.1(1), I believe that should give rise to a common-law claim for termination in violation of public policy as was recognized in *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982).

As with MCL 780.756(3), I believe plaintiff is obliged to demonstrate that MCL 771.1(1) was actually violated to support her common-law claim, and not merely that her interpretation of the statute as having been violated is reasonable. That said, I believe that plaintiff has identified an actual violation of the statute. Defendants argue that the statute only prohibits *exclusively* probationary sentences, citing *People v Gutierrez*, unpublished per curiam opinion of the Court of Appeals, issued December 23, 2014 (Docket No. 317593), but that is not what the statute says or what *Gutierrez* holds. The statute says that "the court may place the defendant on probation" for criminal prosecutions "other than . . . criminal sexual conduct in the first or third degree." The defendant in the underlying criminal matter was convicted of CSC-III, and therefore his conviction was not eligible for probation. *Gutierrez* does not hold to the contrary. In *Gutierrez*, the trial court misconstrued MCL 771.1(1) as requiring that an individual convicted of CSC-III be sentenced to *prison*. The Court of Appeals held that this was wrong and that CSC-III defendants remain eligible for intermediate sanctions under MCL 769.34(4). While probation is *one* such intermediate sanction, it is not the only one. While the Court of Appeals held in *Gutierrez* that the defendant there did not necessarily have to be sentenced to prison and remained eligible for intermediate sanctions, it does not follow from that conclusion that any portion of a CSC-III defendant's sentence can include probation. I believe the sentence agreement that plaintiff's supervisor entered into violated MCL 771.1(1), and while that violation is not susceptible to being "reported" under the WPA, plaintiff's efforts to bring the prosecution into compliance with the law are a proper basis for a common-law claim for termination in violation of public policy if she can prove that she was retaliated against due to her efforts at achieving that compliance.

In short, then, I agree in full with the Court's decision to resuscitate plaintiff's intentional-tort claims, although I would add that I do not believe the "good faith" standard from *Odom* properly applies under these circumstances. I further agree with the result of resuscitating plaintiff's WPA claim under MCL 780.756(3), because I believe she has identified an actual violation of that statute which she alleges she was retaliated against for reporting. I dissent from the decision to resuscitate plaintiff's WPA claim premised on MCL 771.1(1), because I do not believe violations of that statute are susceptible to being "reported," as court judgments are matters of public record. That said, precisely because violations of MCL 771.1(1) are not susceptible to being "reported" under the WPA, the WPA provides no remedy and cannot preempt a common-law claim for termination in violation of public policy premised on plaintiff's efforts to achieve compliance with MCL 771.1(1). Because MCL 771.1(1) is an expression of the state's public policy, I do believe that it is a legitimate basis for plaintiff's claim that

she was terminated in violation of that public policy when she alleges that she was retaliated against for seeking to achieve compliance with the statute.[2] With these corrections to the decisions of the Court of Appeals, I of course concur with the Court's decision to remand to the Court of Appeals to consider the issues it did not reach (such as whether plaintiff's claims are not viable because they are time-barred).

ZAHRA, J. (*concurring in part and dissenting in part*). I concur with the majority's holding that the Court of Appeals erred by holding that defendant Christopher Boyd is entitled to governmental immunity from tort liability. I dissent, however, from the remainder of the majority's order sustaining plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and her public-policy claim. In short, plaintiff did not communicate "a violation or a suspected violation of a law" to a public body for purposes of the WPA. Plaintiff also cannot show that she failed or refused to violate a law such that her employer's alleged retaliation against her, leading to her purported constructive discharge, was in violation of public policy. Because both plaintiff's WPA and public-policy claims lack merit, I would affirm the Court of Appeals' dismissal of those two claims.

The WPA provides, in pertinent part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state . . . to a public body, unless the employee knows that the report is false . . . .[1]

To survive summary disposition, a plaintiff raising a WPA claim must first establish a prima facie case that "(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the

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[2] I disagree with Justice ZAHRA that for a common-law claim under *Suchodolski*, "there must actually be a violation of the law or, at the very least, a request from an employer that the plaintiff-employee violate the law and that the plaintiff failed or refused to do so." What this Court recognized is that "[t]he courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges." *Suchdolski*, 412 Mich at 695. The focus is on the "legislative expression of policy." I think there is little reason to treat an employer's direct request to an employee to violate a law differently from an employee's efforts to achieve compliance with the law; in both circumstances, obedience to the state's public policy is at issue, and a retaliatory discharge undermines that public policy.

[1] MCL 15.362.

protected activity and the discharge or adverse employment action."[2] Plaintiff alleges that she engaged in protected activity under the WPA when she reported to Saginaw County Prosecuting Attorney John McColgan an "unlawful" plea deal that Boyd, the Chief Assistant Prosecuting Attorney and plaintiff's immediate supervisor, negotiated in a 2013 sexual assault case while plaintiff was away on her honeymoon. The plea deal provided that the criminal defendant would plead guilty to one count of third-degree criminal sexual conduct (CSC-III)[3] in exchange for the dismissal of several other charges and a sentencing recommendation of one-year in jail followed by probation. Plaintiff consulted with the victims of the 2013 sexual assault case and obtained their views on a potential disposition of the charges and sentences before she left. Boyd, knowing the victims' views from plaintiff's earlier consultation, did not consult with the victims again before finalizing the plea deal at issue.

Plaintiff first claims that Boyd's failure to consult with the victims before finalizing the plea deal violated MCL 780.756(3) of the Crime Victim's Rights Act, MCL 780.751 *et seq*., which provides:

> Before finalizing any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the prosecution for the crime, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs.

Contrary to plaintiff's argument, she did not communicate to McColgan "a violation or a suspected violation" of MCL 780.756(3) for purposes of the WPA. That provision simply requires that the victim of a crime be given the opportunity to express his or her views on the disposition of the prosecution before any negotiations are finalized.[4]

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[2] *Pace v Edel-Harrelson*, 499 Mich 1, 6 (2016) (quotation marks and citation omitted).

[3] MCL 750.520d.

[4] Chief Justice CLEMENT focuses on the Legislature's use of the word "finaliz[e]" to conclude that it is "apparent" the consultation with a victim required under the Crime Victim's Rights Act must occur when "finalization [of a plea is] the *only* thing that remain[s] to be done[.]" To reach this conclusion, Chief Justice CLEMENT must inject into the statute an immediacy requirement that is nowhere to be found in its language. The sum and substance of the statute is clear. It states, "[T]he prosecuting attorney shall offer the victim the opportunity to consult with the [prosecutor]" before finalizing a plea negotiation. MCL 780.756(3). The word "before" simply means that an action occurs earlier in time than one or more other actions. See *Merriam-Webster's Collegiate Dictionary* (11th ed) ("earlier than the time that"); *The American Heritage Diction-*

Plaintiff concedes that she consulted with the victims and obtained their views about plea and sentencing negotiations before she left for her honeymoon. And the record demonstrates that Boyd was aware of the victims' views before he finalized the plea deal. Therefore, MCL 780.756(3) was satisfied and no actual violation of law occurred.

Further, while plaintiff may have believed Boyd's decision not to consult with the victims before finalizing the plea deal amounted to a violation of MCL 780.756(3), her belief was not reasonable and, thus, does not amount to "a suspected violation of . . . law."[5] Plaintiff was an experienced prosecutor whose job it was to know the requirements of MCL 780.756(3). Thus, plaintiff should have been aware that her earlier consultation with the victims satisfied the statute. Plaintiff's belief that Boyd's decision not to consult the victims again before finalizing the plea deal amounted to "a suspected violation" of the statute, even if in good faith, was not reasonable. Therefore, her communication to McColgan regarding MCL 780.756(3) was not protected activity under the WPA.

Next, plaintiff alleges that Boyd's plea deal violated MCL 771.1(1), which prohibits a trial court from placing a criminal defendant convicted of CSC-III on probation.[6] Contrary to plaintiff's argument, she did not communicate to McColgan "a violation or a suspected violation of" MCL 771.1(1) for purposes of the WPA. As an initial matter, the statute does

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ary of the English Language (5th ed) ("[i]n advance of the time when"). In other words, as long as the prosecuting attorney consults with the victim in advance of the time when negotiations are finalized, the statute is satisfied. If that consultation occurs after negotiations are finalized, the statute is violated. Because the victims were consulted with before the plea was finalized, the requirements of the Crime Victim's Rights Act were satisfied.

[5] Although this Court has never addressed the standard for when a plaintiff reports "a suspected violation of the law" under the WPA, other courts have determined that "[t]he suspected violation of the law is judged on a subjectively reasonable standard: the employee must have been acting in good faith and been subjectively reasonable in the belief that the conduct was a violation of the law." *Smith v Gentiva Health Servs (USA) Inc*, 296 F Supp 2d 758, 762 (ED Mich, 2003), citing *Melchi v Burns Int'l Security Servs, Inc*, 597 F Supp 575, 583 (ED Mich, 1984) (stating that "the Michigan legislature, by using the term 'suspected violations,' meant to bring within the [WPA's] protections an employee's subjective good faith belief that he was reporting a violation of the law"). Decisions of intermediary federal courts are not binding on this Court but may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607 (2004). Further, the model jury instruction states that a plaintiff "must reasonably believe that a violation of law or a regulation has occurred" and that "the employee cannot have a reasonable belief if [he / she] knows [his / her] report is false." M Civ JI 107.04.

[6] MCL 771.1(1) provides:

not expressly prohibit a sentence that combines jail time and probation. Even if it did, the question is whether *Boyd* can be said to have violated MCL 771.1(1) when he agreed, as part of the plea deal in the 2013 sexual assault case, to recommend a mixed jail-time and probation sentence for a CSC-III conviction. As the Court of Appeals correctly observed below, it is the trial court's responsibility to sentence a criminal defendant, not the prosecutor's, and a plea agreement and sentencing recommendation does not bind a sentencing judge.[7] Put simply, MCL 771.1(1) constrains what *the sentencing court* may impose as a sentence, it does not constrain what *the prosecutor* may offer as a sentencing recommendation to a plea agreement. Nothing in the language of MCL 771.1(1) supports plaintiff's argument that a prosecutor offering or agreeing to a plea deal that recommends an allegedly invalid sentence constitutes "a violation . . . of a law" for purposes of the WPA. Nor was it reasonable for plaintiff—an experienced prosecutor whose job it was to know the respective roles of the prosecution and the trial court in handling a criminal case—to believe that "a suspected violation" of MCL 771.1(1) had occurred.

Further, it is important to emphasize that the alleged violation or suspected violation of law at issue is not the plea deal itself; rather, it is the sentence that *would have been imposed if* the trial court had agreed with Boyd's sentencing recommendation that plaintiff claims she reported to McColgan as a violation or suspected violation of MCL 771.1(1). This Court has explained that the WPA only contemplates an existing act or conduct that has occurred or is ongoing; it does not contemplate a future, planned, or anticipated act or conduct that may or may not occur.[8] A sentence cannot be deemed invalid or unlawful unless and until it is imposed by the trial court.[9] Because the allegedly unlawful sentence was never imposed, the acts or conduct underlying

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> In all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

[7] *Janetsky v Saginaw Co*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2020 (Docket Nos. 346542 and 346565), p 8, citing *People v Cobbs*, 443 Mich 276, 282 (1993) and *People v Killebrew*, 416 Mich 189, 208 (1982).

[8] *Pace*, 499 Mich at 7-8.

[9] Indeed, facts and circumstances bearing on a criminal defendant's sentence often change between a plea hearing and sentencing. For

the violation or suspected violation of law never occurred. Accordingly, when plaintiff informed McColgan of the terms of Boyd's plea deal, she had communicated, at most, what she believed was an *anticipated* violation of MCL 771.1(1)—i.e., that the criminal defendant's mixed jail-time and probation sentence, if imposed by the trial court, would violate MCL 771.1(1). Therefore, plaintiff did not engage in protected activity for purposes of the WPA.[10]

Finally, plaintiff contends that she has a viable public-policy claim based on her failure or refusal to violate MCL 771.1(1). Plaintiff argues that her refusal to allow the plea deal to stand despite intense pressure from Boyd, together with her insistence on filing a motion to set aside the sentencing agreement, led to Boyd retaliating against her and to her constructive discharge.[11] In order to assert a public-policy claim under

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example, errors in preliminary scorings of a defendant's prior record variables or offense variables are often uncovered in preparation for sentencing, and parties frequently disagree about the scoring of those variables at sentencing. These changes and disagreements affect the defendant's guidelines minimum sentence range. Further, mandatory minimum sentences may be found to be applicable (or not) after a plea deal is entered. Thus, as any attorney practicing criminal law well knows, the prospective sentence that a criminal defendant might receive based on an initial review of the case may be quite different than the sentence ultimately imposed. But it is not until the trial court imposes the sentence that a defendant may appeal or move for relief from judgment on the ground that the sentence is invalid or unlawful. It is simply unfathomable to conclude that plaintiff, an experienced prosecutor, could have reasonably believed that Boyd, a prosecutor with no authority to impose a criminal sentence, violated or was suspected to have violated MCL 771.1(1) by merely agreeing to recommend a sentence not yet imposed by the trial court.

[10] It is inconsequential that Boyd signed the motion to set aside the sentencing agreement, which stated that "the sentencing agreement contemplated by the parties is unlawful and cannot be imposed by any court." Again, only a trial court can impose a criminal sentence, and it is undisputed that the mixed jail-time and probation sentence was never imposed. Like plaintiff's communication to McColgan, the motion to set aside the sentencing agreement contemplated, at most, an anticipated violation of MCL 771.1(1).

[11] " 'Constructive discharge is not in itself a cause of action' but, rather, 'a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily.' " *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 471 (2020), quoting *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487 (1994). "A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an

the failure-or-refusal-to-violate-the-law exception to at-will employment set forth in *Suchodolski v Mich Consol Gas Co*,[12] there must actually be a violation of the law or, at the very least, a request from an employer that the plaintiff-employee violate the law and that the plaintiff failed or refused to do so.[13] Here, there was no law that plaintiff could have possibly been asked to violate. Again, MCL 771.1(1) prohibits *a trial court* from imposing probation for a CSC-III conviction. Even if MCL 771.1(1) prohibited the mixed jail-time and probation sentence at issue, because such a sentence was never imposed, MCL 771.1(1) was not violated. Moreover, plaintiff and Boyd, as prosecuting attorneys, could not violate MCL 771.1(1). Therefore, Boyd could not request that plaintiff violate MCL 771.1(1), nor could he retaliate against her for failing or refusing to violate a statute that she could not actually violate.[14] Accordingly, plaintiff's public-policy claim under *Suchodolski*'s failure-or-refusal-to-violate-the-law exception lacks merit, and a remand to the Court of Appeals on this issue is futile.

In sum, plaintiff's WPA claim fails because she did not communicate "a violation or a suspected violation" of MCL 780.756(3) or MCL 771.1(1) to a public body for purposes of the WPA. Her public-policy claim also

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involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Jewett*, 332 Mich App at 471 (quotation marks and citations omitted).

[12] *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982).

[13] *Id*. at 695 ("[A] cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment."), citing *Trombetta v Detroit, T & I R Co*, 81 Mich App 489 (1978) (sustaining a public-policy claim of an employee who was discharged refusing to manipulate and adjust pollution-control reports).

Chief Justice CLEMENT believes plaintiff has a valid public-policy claim under *Suchodolski* because plaintiff's efforts of achieving compliance with the law are no different, and entitled to no less protection, than if her employer had made a direct request for her to violate the law. Not only would this be a remarkably broad expansion of *Suchodolski*'s failure-or-refusal-to-violate-the-law exception, Chief Justice CLEMENT ignores the reality that plaintiff's complaint does not advance such a novel theory; instead, plaintiff only contends that she was retaliated against for failing or refusing to violate the law and that this retaliation lead to her constructive discharge.

[14] See *Stegall v Resource Tech Corp*, 509 Mich 1086, 1092 n 18 (2022) (ZAHRA, J., dissenting) ("[I]t boggles the mind to think that an employee could have failed or refused to violate the law—or acquiesced in its violation, in plaintiff's telling—when there was no actual violation of the law.").

fails because she did not fail or refuse to violate MCL 771.1(1). I would therefore affirm the Court of Appeals' dismissal of these claims. Because a majority of this Court keeps these meritless claims alive, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

WELCH, J. (*dissenting in part*). I agree with the majority that the Court of Appeals committed an error requiring reversal because genuine issues of material fact remain as to whether (1) defendant Christopher Boyd acted in good faith and thus is entitled to immunity for tort liability and (2) plaintiff engaged in protected activity under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., by reporting actual or suspected violations of the law. I write separately because I agree with the Court of Appeals' conclusion that the WPA provides the exclusive remedy for plaintiff's public-policy claim. Plaintiff's public-policy claim arises out of the same facts that are the basis for her WPA claim. Further, since she works for a public-sector employer who is a "public body" under the WPA, any concerns she raised with her employer are covered by the WPA. As a result, I believe her public-policy claims are preempted by the WPA.

Plaintiff asserts that her claim of unlawful retaliation under the WPA and her unlawful constructive discharge in violation of Michigan's public policy, pursuant to *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982), are separate claims arising out of different facts. Plaintiff argues that her public-policy claim arises out of her refusal to participate in her supervisor Boyd's alleged illegal actions when he pressured her not to file a motion to vacate what she perceived to be an illegal guilty plea and sentencing agreement Boyd had entered into with the criminal defendant. Although normally at-will employment relationships may be terminated with or without cause, an exception exists when "discharging an employee [is] so contrary to public policy as to be actionable." *Suchodolski*, 412 Mich at 695. Public-policy claims include adverse employment actions in response to an employee's "refusal to violate a law in the course of employment" or in response to the employee's "exercise of a right conferred by a well-established legislative enactment." *Id*. at 695-696. But "[a] public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80 (1993), disapproved of on other grounds by *Brown v Detroit Mayor*, 478 Mich 589 (2007). The WPA is the exclusive remedy for an employee whose employment is terminated in retaliation for reporting an employer's violation of the law. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 383 (1997).

In this case, plaintiff's public-policy claim relies on the same underlying facts as her WPA claim. While plaintiff argues that her complaint about the suspected violation of MCL 771.1 is separate from her efforts to correct the guilty-plea agreement and pressure she allegedly received from Boyd not to file the corrective motion, the facts are not legally distinctive. Both claims spring from plaintiff's belief that the plea deal and sentencing agreement were illegal, a concern that she allegedly reported and attempted to rectify. Stated differently, given that plaintiff had already reported her concerns that Boyd violated MCL 771.1, her

attempt to vacate what she suspected was an illegal guilty plea and sentencing agreement is part of the same chain of events that she alleges give rise to that part of her WPA claim.

Furthermore, even if the sequence of events can be parsed and separated into factually distinct matters, plaintiff was communicating with management as part of her efforts to rectify the perceived problems with the plea. The WPA provides retaliation protection to employees who report actual or suspected violations of the law to a "public body." MCL 15.362. Defendant Saginaw County is a "public body" as defined by MCL 15.361(d)(*iii*). Therefore, any separate action by plaintiff under the alleged facts would also be covered by the WPA given her communication with office management. Thus, whether the facts related to her efforts to file a motion to vacate the plea agreement are related to her initial complaint about the plea agreement or not, the WPA covers both scenarios and provides her the exclusive remedy for the alleged retaliatory discharge. *Dolan*, 454 Mich at 382-383.

For these reasons, I respectfully dissent from the majority's decision to reverse the Court of Appeals' holding that plaintiff's public-policy claim was preempted by the WPA. In all other respects, I join the majority's order.

PEOPLE v FRINKLE, No. 164705; Court of Appeals No. 359649. On order of the Court, the application for leave to appeal the May 20, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v BOTHE, No. 164815; Court of Appeals No. 361725. On order of the Court, the application for leave to appeal the July 28, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

Oral Argument Ordered on the Application for Leave to Appeal December 21, 2022:

PEOPLE v MUSSELMAN, No. 163290; Court of Appeals No. 351700. The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing whether the resentencing court abused its discretion in the relative value it placed on the evidence of the appellant's character and behavior before and during the crime, which took place in 1980, in light of the more recent evidence regarding his rehabilitation.

The Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys of Michigan, and the University of Michigan Juvenile Justice Clinic are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

VIVIANO, J., would deny leave to appeal.

PEOPLE v ROOSEVELT JOHNSON, No. 164694; reported below: 342 Mich App 90. The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing whether the Court of Appeals erred by affirming the assignment of 10 points to Offense Variable 3, MCL 777.33 for prophylactic treatment following a sexual assault, and in particular whether the holding in *People v Barnes*, 332 Mich App 494, 500 (2020), lv den 507 Mich 893 (2021), conflicts with the holding in *People v Rosa*, 322 Mich App 726, lv den 502 Mich 904 (2018).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 21, 2022:

PEOPLE v KENNETH YOUNG, No. 164077; Court of Appeals No. 351793.

SCHEMAHORN v CITY OF NILES, No. 164305; Court of Appeals No. 355028.

PEOPLE v PEOPLES, No. 164647; Court of Appeals No. 361896.

PEOPLE v CHRISTOPHER ANDREWS, No. 164706; Court of Appeals No. 362137.

PEOPLE v CRUMP, No. 164799; Court of Appeals No. 357510.

STATE TREASURER v SAMPSON, No. 164856; Court of Appeals No. 357454.

Summary Disposition December 22, 2022:

PEOPLE v RILEY, No. 164718; Court of Appeals No. 360389. On order of the Court, the application for leave to appeal the July 7, 2022 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Wayne Circuit Court for amendment of the Presentence Investigation Report to correct the defendant's date of birth and age, consistent with his birth certificate. In all other respects, leave to appeal is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

ZAHRA, J., would deny leave to appeal.

In re SL KORDUPEL, No. 164919; Court of Appeals No. 359419. On order of the Court, the application for leave to appeal the September 29, 2022 judgment of the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III(A) of the judgment of the Court of Appeals and we REMAND this case to that court to specifically address the respondent's argument that the foster parent intentionally impeded reunification efforts despite the court-ordered goal of reunification. See *In re Mason*, 486 Mich 142, 152

(2010). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Granted December 22, 2022:

STOKES v SWOFFORD, No. 162302; reported below: 334 Mich App 281. On December 8, 2022, the Court heard oral argument on the application for leave to appeal the October 22, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) whether *Woodard v Custer*, 476 Mich 545 (2006), was correctly decided and is consistent with the requirements of MCL 600.2169(1); (2) if not, whether it should nonetheless be retained under principles of stare decisis, *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000); (3) if *Woodard* should be retained, whether a defendant's practice of only a single medical specialty affects the application of *Woodard*'s "one most relevant specialty" requirement, 476 Mich at 560; (4) if *Woodard* was not correctly decided and should not be retained, the test that should be applied under MCL 600.2169(1); and (5) whether the Court of Appeals reached the right result under the proper application of the requirements of MCL 600.2169 in this case. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Selliman v Colton, MD* (Docket No. 163226).

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. The American Medical Association and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

SELLIMAN v COLTON, No. 163226; Court of Appeals No. 352781. On December 8, 2022, the Court heard oral argument on the application for leave to appeal the May 20, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is GRANTED. The parties shall include among the issues to be briefed: (1) whether *Woodard v Custer*, 476 Mich 545 (2006), was correctly decided and is consistent with the requirements of MCL 600.2169(1); (2) if not, whether it should nonetheless be retained under principles of stare decisis, *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000); (3) if the "one most relevant specialty" test as set forth in *Woodard* is not consistent with MCL 600.2169(1) and should not be retained, the test that should be applied; (4) if *Woodard*'s interpretation of "majority of . . . professional time" is not consistent with MCL 600.2169(1) and should not be retained, the correct interpretation; and (5) whether the Court of Appeals reached the right result under the proper application of the requirements of MCL 600.2169 in this case. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

We further direct the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *Stokes v Swofford, DO* (Docket No. 162302).

Amici who appeared at the application stage are invited to file supplemental briefs amicus curiae. The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Oral Argument Ordered on the Application for Leave to Appeal December 22, 2022:

PEOPLE V HURLEY, No. 164608 and 164609; Court of Appeals No. 349640 and 358067. The parties shall file supplemental briefs in accordance with MCR 7.312(E) addressing: (1) whether a verdict may be impeached based on juror misconduct if the misconduct occurred prior to the jury's deliberative process, see *People v Budzyn*, 456 Mich 77 (1997); and (2) whether there may be cases of "juror bias so extreme that, almost by definition, the jury trial right has been abridged," see *Warger v Shauers*, 574 US 40 (2014), and if so, whether that exception applies to the facts of this case?

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied December 22, 2022:

PERRY V STATE OF MICHIGAN, No. 163354; Court of Appeals No. 351469.

MCCORMACK, J. (*concurring*). With reluctance, I concur in the Court's decision to deny leave to appeal. In *Tomasik v State*, 505 Mich 956 (2020) (MCCORMACK, C.J., concurring), I explained that the statutory language in the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., does not appear to allow for compensation for a plaintiff who has established innocence by new evidence but who obtained relief from their criminal convictions for some other reason (for Mr. Perry, prosecutorial misconduct and ineffective assistance of counsel for not objecting to the prosecutorial misconduct).

I still think so. And I am still deeply troubled by what that means in cases like these. A criminal defendant who can establish that new evidence (1) demonstrates that they didn't commit the crime, (2) results in the reversal or vacation of their convictions, and (3) results in an acquittal at retrial or dismissal of all charges can obtain compensation under the WICA. Yet a criminal defendant who establishes the first and the last of those elements—and could have established the second as well if that were the only issue in their appeal—is excluded if an

additional error resulted in the reversal or vacation of their conviction. Take this case: the Court of Appeals reversed and ordered a new trial based on prosecutorial misconduct and ineffective assistance for failure to object to that misconduct. For that reason, the panel declined to address the claim that new evidence required a new trial. Yet that new evidence demonstrated innocence and resulted in an acquittal on all charges at retrial, and likely would have resulted in the reversal of the convictions but for the reversal on other grounds.

The purpose of the WICA is to repair some of the harm done to the wrongfully convicted. *Ricks v State*, 507 Mich 387, 402 (2021). Why would the Legislature exclude those wrongfully convicted who suffered *additional* wrong(s) (by their lawyer, the prosecutor, the trial judge, the police)?

It would be slightly less disconcerting if this example were rare. But I suspect the opposite is true. Wrongful convictions are almost always the result of multiple system failures—an ineffective lawyer, evidence withheld by police or prosecutors, junk science, a trial court reluctant to gatekeep effectively. When systems fail, errors occur; some of those errors map neatly onto legal claims about new evidence of innocence but often failing systems produce other errors that are unrelated to new evidence. Just look at this case and *Tomasik*. Mr. Perry and Mr. Tomasik were certainly not *less* wrongfully incarcerated than those eligible for compensation under the WICA.

The WICA is still a new statute. And many statutes need tweaks after they get some road testing. In *Tomasik* I asked the Legislature to "consider whether it intended to exclude individuals such as the plaintiff—call them 'new evidence plus-ers'—from the WICA." *Tomasik*, 506 Mich at 957 (MCCORMACK, C.J., concurring). Had it done so, Mr. Perry wouldn't be here. Three hundred thousand dollars would not make Mr. Perry whole, to be sure. But the news that he doesn't qualify for even that small gesture at repairing the harm done to him because he suffered legal error in addition to the undiscovered evidence of his innocence is a rule of decision I would be hard pressed to justify. Keep the bad luck coming, I guess.

I don't like administering legal rules that I can't explain to the people they impact. Please fix it, legislators.

CAVANAGH, J., joins the statement of MCCORMACK, J.

PEOPLE v MONROE, No. 164624; Court of Appeals No. 357631.

ZAHRA and VIVIANO, JJ., would reverse the judgment of the Court of Appeals for the reasons stated by the dissenting judge in that court.

ATTORNEY GENERAL v ELI LILLY AND COMPANY, No. 164759; Court of Appeals No. 362272.

In re MYERS, No. 164929; Court of Appeals No. 359930.

PEOPLE v BLUST, No. 165084; Court of Appeals No. 363262.

Summary Disposition December 29, 2022:

PEOPLE v BLACK, No. 158902; Court of Appeals No. 338985. By order of June 4, 2021, the application for leave to appeal the November 27, 2018 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Boykin* (Docket No. 157738) and *People v Tate* (Docket No. 158695). On order of the Court, the cases having been decided on July 28, 2022, 510 Mich 171 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part I of the Court of Appeals judgment and we REMAND this case to that court for reconsideration of that issue in light of *People v Boykin* (Docket No. 157738) and *People v Tate* (Docket No. 158695). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented regarding the proportionality of the sentence should be reviewed by this Court. We do not retain jurisdiction.

ZAHRA, J. (*concurring in part and dissenting in part*). I would deny leave to appeal consistent with my dissent in *People v Boykin*, 510 Mich 171, 201-224 (2022).

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in Justice ZAHRA's dissent in *People v Boykin*, 510 Mich 171, 201-224 (2022), I do not believe that the reasoning of *Miller v Alabama*, 567 US 460 (2012), should have been extended to term-of-years sentences under MCL 769.25 and MCL 769.25a. Instead, I would apply traditional sentencing considerations when a juvenile is sentenced to less than life without parole. See *Boykin*, 510 Mich at 223-224 (ZAHRA, J., dissenting). Therefore, I would deny leave to appeal on all of the issues raised by defendant.

PEOPLE v NUNEZ, No. 162372; Court of Appeals No. 349035. By order of September 22, 2021, the application for leave to appeal the October 22, 2020 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Taylor* (Docket No. 154994). On order of the Court, the case having been decided on July 28, 2022, 510 Mich 112 (2022), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals judgment addressing the sentencing judge's exercise of discretion under MCL 769.25, we VACATE the sentence of the Ottawa Circuit Court, and we REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a disproportionate sentence. *Taylor*, *supra*. Because the sentencing court in this case did not apply the "clear and convincing" standard, the defendant is entitled to resentencing. *Id*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112, 150-170 (2022), I do not believe there is a presumption that life without parole is a

disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. I respectfully dissent from the order vacating in part the Court of Appeals' judgment, vacating defendant's sentence, and remanding for resentencing; I concur in the denial of leave in all other respects.

Leave to Appeal Denied December 29, 2022:

BELLINGER v INTERNATIONAL PRECAST SOLUTIONS, LLC, No. 163717; Court of Appeals No. 354666.

PEOPLE v RAINES, No. 164740; Court of Appeals No. 358015.

In re PILAND, No. 164908; Court of Appeals No. 360062.

PEOPLE v ROBINSON, No. 165091; Court of Appeals No. 362938.

Special Orders

SPECIAL ORDERS

In this section are orders of the Supreme Court (other than orders entered in cases before the Court) of general interest to the bench and bar of the state.

Order Entered August 10, 2022:

PROPOSED AMENDMENTS OF ADMINISTRATIVE ORDER NO. 2020-17 AND RULE 4.201 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Administrative Order No. 2020-17 and Rule 4.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

ADMINISTRATIVE ORDER NO. 2020-17 – CONTINUATION OF ALTERNATIVE PROCEDURES FOR LANDLORD/TENANT CASES

~~The number of new COVID-19 cases in Michigan has dropped dramatically in recent weeks and m~~Many people believe that our state is finally at the end of the pandemic. Still, the court system will long be dealing with the effects brought about by the greatest health crisis in our generation. ~~One of those effects is a prolonged period of housing insecurity experienced by those most affected by the pandemic's nearly instantaneous and extensive job reductions — the 30 to 40 million people nationally who rent their housing.~~

Throughout the pandemic, f~~F~~ederal response to this problem has taken two forms: eviction moratoria and direct state aid. Several eviction moratoria were~~have been~~ imposed, both by Congress (Pub L. 116-136) and by the CDC (published at 85 FR 55292 and extended by Order dated March 28, 2021), prohibiting evictions for tenants in certain types of government-supported housing or who meet certain income restrictions. Those moratoria have since been lifted.~~The most recently-extended CDC order is slated to expire July 31, 2021 unless~~

~~extended further. In addition, challenges to these CDC orders have been working their way through the courts, with conflicting opinions as a result.~~

~~However, t~~The second type of federal response~~ continues to be relevant regardless of the status of the CDC order—~~direct aid to states to provide for rental assistance programs is also coming to an end. ~~In 2021 PA 2, the Michigan Legislature appropriated $220 million (of the total of $600 million in federal money designated for Michigan) to provide rental assistance to tenants and landlords. Section 301(2) states that "[t]he department of labor and economic opportunity shall collaborate with the department of health and human services, the judiciary, local community action agencies, local nonprofit agencies, and legal aid organizations to create a rental and utility assistance program." This Court has done so in previous iterations of Administrative Order No. 2020-17 by working with those agencies to establish a procedure that ensures landlords and tenants are able to benefit from those dollars.~~However, t~~The need for that programming continues, even assuming the health risks associated with the typical manner of processing eviction proceedings has eased.

The~~In addition, the mandate for courts to continue to~~ use of remote technology to the greatest extent possible is as important~~fully in place~~ today as it was two~~a~~ years ago. Now is~~We anticipate this fall will be~~ the appropriate time to consider what changes in procedure, adopted with as much speed and thought as possible in the midst of a pandemic, should be retained or changed before becoming permanent practices in our state courts. This effort has been~~will be~~ based on input from state court stakeholders, but even early data showed us that expanded use of technology has improved rates of participation and been a boon to issues related to access to justice. We do not intend to squander the gains hard-won when all judges, court staff, attorneys, and individuals were forced to change their practices with little advance notice and training and in doing so, created a footprint for a new way to work that serves the needs of court users in novel and innovative ways.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4,ich provides for the Supreme Court's general superintending control over all state courts, directing that ~~courts to process landlord/tenant cases following the procedures outlined in this order.~~

~~(A)~~ ~~A~~all local administrative orders requiring a written answer pursuant to MCL 600.5735(4) be~~are~~ temporarily suspended.[1] Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.

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[1] The local administrative orders include: 1st District Court (Monroe County); 2A District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95B District Court (Dickinson and Iron Counties).

~~(B) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:~~

~~(1) Defendant has the right to counsel. MCR 4.201(F)(2).~~

~~(2) The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), Housing Assessment and Resource Agency (HARA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.~~

~~(3) Defendants DO NOT need a judgment to receive assistance from MDHHS, the HARA, or the local CEA. The Summons and Complaint from the court case are sufficient for MDHHS.~~

~~(4) The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.~~

~~(5) The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.~~

~~(C) The pretrial required under subsection (B) may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer), or a CDRP mediator.~~

~~(D) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. The court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing, if applicable. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.~~

~~(E) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing in subsection (B) is conducted. Nothing in this order limits the statutory authority of a judge to adjourn for a longer period. MCL 600.5732. Any party who does not appear at the hearing scheduled for the adjourned date~~

~~will be defaulted. Cases need not be adjourned for seven days if: the plaintiff dismisses the complaint, with or without prejudice, and without any conditions; if defendant was personally served under MCR 2.105(A) and fails to appear; if plaintiff pleads and proves, with notice, a complaint under MCL 600.5714(1)(b), (d), (e) or (f), sufficient to meet the statutory and court rule requirements and a judge is available to hear the proofs; or where both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court. Where plaintiff and defendant are represented by counsel, the parties may submit a conditional dismissal or consent judgment in lieu of appearing personally at the second hearing. Nothing in this subsection supersedes the right to an attorney pursuant to 4.201(F)(2).~~

~~(F) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner.~~

~~(G) In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, a court must stay further proceedings after the pretrial hearing is conducted and not proceed to judgment if a defendant applies for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The stay is contingent upon the following events:~~

~~(1) An eligibility determination is made by the appropriate HARA within 30 days of the pretrial hearing;~~

~~(2) The defendant is eligible to receive rental assistance for all rent owed; and~~

~~(3) The plaintiff receives full payment from the CERA program within 45 days of the pretrial hearing.~~

~~If any of these events do not occur, excluding delays attributable to the plaintiff, the court must lift the stay and continue with proceedings. Nothing in this order limits the statutory authority of a judge to adjourn a Summary Proceedings case. MCL 600.5732.~~

~~(H) In cases filed before this administrative order was amended to include procedure related to the CERA program (i.e., before March 22, 2021), if a party notifies the court that it has applied for CERA at any point prior to issuance of a writ, the court shall stay the proceeding as provided under subsection (G) of this order.~~

~~(I) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non- SCAO forms) within the statutory period (MCL 600.5744) or after the expiration of the CDC order, whichever date is later. MCL 600.5744(5), which provides a 10 day minimum statutory period to pay or move, is tolled until expiration of the CDC order. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day period in that rule shall commence on the first day after the expiration of the CDC order for those cases.~~

This order is effective immediately until further order of the Court.

RULE 4.201 SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES

(A) Applicable Rules; Forms. Except as provided by this rule and MCL 600.5701 *et seq.*, a summary proceeding to recover possession of premises from a person in possession as described in MCL 600.5714 is governed by the Michigan Court Rules. Forms available for public distribution at the court clerk's office and SCAO- approved forms located online may be used in the proceeding.

(B) Complaint.

(1)-(2) [Unchanged.]

(3) Specific Requirements.

(a)-(b) [Unchanged.]

(c) If the tenancy is of residential premises, the complaint must allege that the lessor or licensor has performed his or her covenants to keep the premises fit for the use intended, ~~and~~ in reasonable repair during the term of the lease or license, and in compliance with applicable state and local health and safety laws, unless the parties to the lease or license have modified those obligations, as provided for by statute.

(d)-(e) [Unchanged.]

(C) Summons.

(1)-(2) [Unchanged.]

(3) The summons must also include the following advice to the defendant:

(a)-(e) [Unchanged.]

(f) Pursuant to SCAO guidelines, written information attached to the summons regarding the availability of rental and other housing assistance provided by legal aid or local funding agencies.

(D) [Unchanged.]

(E) Recording. All landlord-tenant summary proceedings conducted in open court, including the pretrial hearing held under subrule (K), must be recorded by stenographic or mechanical means, and only a reporter or recorder certified under MCR 8.108(G) may file a transcript of the record in a Michigan court.

(F) Use of Videoconferencing Technology. For any hearing held under this subchapter, the court must allow the use of videoconferencing technology in accordance with MCR 2.407.

(1) The use of videoconferencing technology shall be presumed for all pretrial hearings, subject to MCR 2.407(B)(5).

(2) Unless the court determines that the use of videoconferencing technology is inappropriate for a particular case under MCR 2.407(C), the use of videoconferencing technology may be used in bench trials and other proceedings if the court has consulted with the parties and counsel.

(3) The use of videoconferencing technology shall not be used in jury trials, except in the discretion of the court after all parties have had notice and opportunity to be heard on the use of videoconferencing technology.

(G~~F~~) Appearance and Answer; Default.

(1)-(3) [Unchanged.]

(4) Jury Demand. If the defendant wants a jury trial, he or she must demand it at least two days before the adjourned trial is scheduled to begin or at the defendant's first appearance, whichever is later~~in the first response, written or oral~~. If the trial is adjourned under subrule (K) and no jury demand has been made, the defendant must demand it at least two days before the rescheduled date. The jury trial fee must be paid when the demand is made.

(5) Default.

(a) If the defendant fails to appear on the date and time noticed by the summons, the court, on the plaintiff's motion, may enter a default and may hear the plaintiff's proofs in support of judgment if~~. If satisfied that the complaint is accurate, the court must enter a default judgment under MCL 600.5741, and in accord with subrule (K). The default judgment must be mailed to the defendant by the court clerk and must inform the defendant that (if applicable)~~

(i) the defendant fails to appear on the date and time noticed by the summons and on the date and time in which trial was adjourned under subrule (K)(1)~~he or she may be evicted from the premises~~;

(ii) personal service of process was made on the defendant under MCR 2.105(A); or~~he or she may be liable for a money judgment.~~

(iii) the plaintiff pleads and proves, with notice, a complaint under MCL 600.5714(1)(b), (d), (e), or (f) sufficient to meet the statutory and court rule requirements.

(b) If satisfied that the complaint has met pleading and proof requirements and a default may enter, the court may enter a default judgment under MCL 600.5741 and in accordance with subrule (L). The default judgment must be mailed to the defendant by the court clerk and must inform the defendant that (if applicable)

(i) he or she may be evicted from the premises;

(ii) he or she may be liable for a money judgment.

(b) [Relettered (c) but otherwise unchanged.]

(d~~e~~) If a default is not entered~~party fails to appear~~, the court must~~may~~ adjourn the trial~~hearing~~ for at least~~up to~~ 7 days. If the trial~~hearing~~ is adjourned, the court must mail notice of the new date to the party who failed to appear.

~~(6) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).~~

(H~~G~~) Claims and Counterclaims.

(1) Joinder.

(a)-(b) [Unchanged.]

(c) A court with a territorial jurisdiction which has a population of more than 1,000,000 may provide, by local rule, that a money claim or counterclaim must be tried separately from a claim for possession unless joinder is allowed by leave of the court pursuant to subrule (H~~G~~)(1)(e).

(d) [Unchanged.]

(e) If adjudication of a money counterclaim will affect the amount the defendant must pay to prevent issuance of an order of eviction, that counterclaim must be tried at the same time as the claim for possession, subrules (HG)(1)(c) and (d) notwithstanding, unless it appears to the court that the counterclaim is without merit.

(2) [Unchanged.]

(IH) Interim Orders. On motion of either party, or by stipulation, for good cause, a court may issue such interim orders as are necessary, including, but not limited to the following:

(1)-(2) [Unchanged.]

(3) Stay of Proceedings. In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, the court must stay further proceedings after conducting the pretrial hearing under subrule (K) and not proceed to judgment if, as described in SCAO guidelines, a defendant applies for rental assistance from a designated funding source or rental assistance agency and notifies the court of that application not later than five days after the defendant is verbally informed as provided in subrule (K)(2). The court may require reasonable verification of the application. The initial stay is lifted after 14 days unless the defendant demonstrates to the court that the application has been approved and rental assistance will be received. The total stay period under this subrule must not exceed 30 days and is automatically lifted 30 days from the date that the initial stay of the proceedings began.

(I) [Relettered (J) but otherwise unchanged.]

(KJ) Trial.

(1) Time.

(a) If after conducting the pretrial hearing under subrule (K)(2)(a) the court adjourns the trial, it must be scheduled at least 7 days after the pretrial hearing.

(b) When trial begins, the court must first decide pretrial motions and determine if there is a triable issue. If there is no triable issue, the court must enter judgment.

(c) ~~When the defendant appears, t~~The court may try the action pursuant to this subrule, or, if good cause is shown, may adjourn trial up to 56 days. If the court adjourns trial for more than 7 days, an escrow order may be entered pursuant to subrule (IH)(2). The parties may adjourn trial by stipulation in writing or on the record, subject to the approval of the court.

(2) Conducting the Trial.

(a) At the initial date and time set for trial noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial the parties must be verbally informed of all of the following:

(i) The right to counsel under subrule (G)(2).

(ii) The right to proper venue under subrule (G)(3).

(iii) The Michigan Department of Health and Human Services, local Coordinated Entry Agency, Housing Assessment and Resource Agency, or federal Help for Homeless Veterans program may be able to assist with payment of some or all of the rent due.

(iv) Defendants do not need a judgment to receive assistance from the Michigan Department of Health and Human Services, local Coordinated Entry Agency, or Housing Assessment and Resource Agency. The summons and complaint from the court case are sufficient for help from the state.

(v) The availability of the Michigan and local community dispute resolution program office as a possible source of case resolution.

(vi) The possibility of a conditional dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such conditional dismissal.

If the defendant does not appear for trial on the date and time noticed by the summons and a default was not entered, the court must verbally inform the defendant of the information in this subrule at his or her first appearance before trial begins and allow, upon request, adequate time to retain counsel.

(b) Unless otherwise provided in this rule, after conducting the pretrial, the court may adjourn the trial as provided in subrule (K)(1).

(c) Immediately following the pretrial hearing, the court may resolve the case without adjourning the trial, if

(i) the plaintiff dismisses the complaint, with or without prejudice, and without any conditions;

(ii) the defendant is personally served under MCR 2.105(A) and fails to appear at the date and time set for trial noticed by the summons under subrule (K)(2)(a);

(iii) both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court;

(iv) the defendant has been advised of his or her rights under subrule (K)(2)(a), has knowingly waived the option of having the trial adjourned, and upon judicial review of the terms after adequate inquiry determines the terms fair and enters into a consent judgment or conditional dismissal on the record; or

(v) any of the circumstances listed in subrule (G)(5)(a)(iii) is pleaded and proved, with notice, sufficient to meet the statutory requirements.

~~(2) Pretrial Action. At trial, the court must first decide pretrial motions and determine if there is a triable issue. If there is no triable issue, the court must enter judgment.~~

(3)-(4) [Unchanged.]

(K) [Relettered (L) but otherwise unchanged.]

(M~~L~~) Order of Eviction.

(1) [Unchanged.]

(2) Issuance of Order of Eviction and Delivery of Order. Subject to the provisions of subrule (M~~L~~)(4), the order of eviction shall be delivered to the person serving the order for service within 7 days after the order is filed.

(3)-(5) [Unchanged.]

(N~~M~~) Postjudgment Motions. Except as provided in MCR 2.612, any postjudgment motion must be filed no later than 10 days after judgment enters.

(1) Except as otherwise provided in this subrule, i~~I~~f the motion

challenges a judgment for possession, the court may not grant a stay.~~unless~~ The court shall grant a stay if

(a)-(b) [Unchanged.]

If a stay is granted, a hearing shall be held within 14 days after it is issued.

(2) If the judgment does not include an award of possession, the filing of the motion stays proceedings, but the plaintiff may move for an order requiring a bond to secure the stay. If the initial escrow deposit is believed inadequate, the plaintiff may apply for continuing adequate escrow payments in accord with subrule (I~~H~~)(2). The filing of a post-judgment motion together with a bond, bond order, or escrow deposit stays all proceedings, including an order of eviction issued but not executed.

(3) [Unchanged.]

(O~~N~~) Appeals From Possessory Judgments.

(1)-(2) [Unchanged.]

(3) Stay of Order of Eviction.

(a) Unless a stay is ordered by the trial court, an order of eviction must issue as provided in subrule (M~~I~~).

(b) [Unchanged.]

(4) Appeal Bond; Escrow.

(a) [Unchanged.]

(b) A defendant who appeals must file a bond providing that if the defendant loses, he or she will pay

(i)-(iii) [Unchanged.]

The court may waive the bond requirement of subrule (O~~N~~)(4)(b)(i) on the grounds stated in MCR 2.002(C) or (D).

(c) If the plaintiff won a possession judgment, the court shall enter an escrow order under subrule (I~~H~~)(2) and require the defendant to make payments while the appeal is pending. This escrow order may not be retroactive as to arrearages preceding the date of the post-trial escrow order unless there was a pretrial escrow order entered under subrule (I~~H~~)(2), in which case the total escrow amount may include the amount accrued between the time of the original escrow order and the filing of the appeal.

(d) [Unchanged.]

(O) [Relettered (P) but otherwise unchanged.]

Staff Comment (ADM File No. 2020-08): The proposed amendments would permanently incorporate certain provisions from Administrative Order No. 2020-17 into court rule format under MCR 4.201 and would make a number of minor changes due to a relettering of the rule. The proposed amendments would also incorporate public comment received at the public hearing on March 16, 2022 and via email, as well as additional recommendations and input received from other stakeholders including the JFAC and the MDJA. Finally, the proposed amendments in this order reference MCR 2.407, which is amended effective September 9, 2022. Readers should refer to the amended version of that rule when reviewing the proposed amendments in this order.

Note that the comment period for this proposal is slightly shorter than the typical three-month period so that this issue can be considered by the Court at its November 2022 public hearing.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by November 1, 2022 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-08. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J. (*dissenting*). Today the Court publishes for comment a proposal that would permanently incorporate some of the provisions of Administrative Order No. 2020-17, the emergency order initially issued in July 2021 to respond to the relatively early developments of the COVID-19 pandemic, into MCR 4.201, the court rule governing summary proceedings to recover possession of premises, and make other permanent changes to that court rule. I write to explain why I would rescind AO 2020-17 in its entirety and why I would not make significant changes to MCR 4.201.

Now that it has been well over two years since the beginning of the COVID-19 pandemic, there is no need to retain Administrative Order No. 2020-17.[1] Only one provision would be retained under the proposal:

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[1] Although I initially voted to adopt AO 2020-17 at the beginning of the pandemic, I quickly changed course once it became clear to me that the order was being used to facilitate an eviction moratorium that appeared to me unconstitutional and indeed was later declared as such. See *Alabama Ass'n of Realtors v Dep't of Health & Human Servs*, 594 US ___; 141 S Ct 2485 (2021). In addition to its legal shortcomings, there are reasons to question the policy merits of the eviction moratorium as well, since it has likely caused (or significantly contributed to) major increases in rents, which are a key driver of inflation. See, e.g., Krafcik, *Rising Rents, Lack of Housing Still an Issue in West Michigan Despite Eviction Moratorium,* WWMT (August 16, 2021) <https://wwmt.com/news/i-team/rising-rents-lack-of-housing-still-an-issue-in-west-michigan-despite-eviction-moratorium> (accessed August 1, 2022) [https://perma.cc/43R3-AT2L]; Rico, *Rents Reach 'Insane' Levels Across US as Eviction Moratorium Ends*, Detroit News (February 20, 2022) <https://www.detroitnews.com/story/news/nation/2022/02/20/apartmentents-eviction-moratorium-

the suspension of local court rules requiring a written answer pursuant to MCL 600.5735(4).[2] The order purports to justify this continued suspension on the fact that the court system is still dealing with the effects of the COVID-19 pandemic. It is not clear to me why suspension of local court rules otherwise allowed by MCL 600.5735(4) is necessary or beneficial. The proposed revision to AO 2020-17 would continue to characterize this suspension as "temporary." But the suspension has been in place for over two years now with no end in sight. If not now, when is the appropriate time to remove this provision?

I am also not convinced of the need for additional changes to MCR 4.201. To the extent that the COVID-19 pandemic has revealed ways in which we can improve landlord-tenant proceedings, I take no issue with considering such improvements. For example, I agree that it would be helpful to provide defendants with information about housing and rental assistance with the summons, which may obviate the need for a trial and save the parties and the court time and resources. But, as explained below, the proposal would go far beyond these types of common-sense reforms.

First, I would not create a presumption that videoconferencing technology be used for pretrial hearings in landlord-tenant proceedings. As I have expressed previously, there are numerous reasons why individual courts and judges should retain full discretion as to whether to use remote technology for a particular proceeding. See Rescission of Pandemic-Related Administrative Orders, 507 Mich cxcvii, ccxiii-ccxix (2021) (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in

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pandemic/49839435/> (accessed August 1, 2022) [https://perma.cc/Y3LP-XDCK]. Unfortunately, this has had a detrimental effect on the very people the moratorium was intended to help. See Schanz, *As Rent Rises in Metro Detroit, Families are Forced to Cut Back in Other Ways*, WXYZ (March 4, 2022) <https://www.wxyz.com/news/as-rent-rises-in-metro-detroit-families-are-forced-to-cut-back-in-other-ways> (accessed August 1, 2022) [https://perma.cc/2PEX-DUGU].

[2] Since initially being issued, this provision in the administrative order has referred to local administrative orders, not local court rules. But the courts referenced in footnote 1 of the administrative order have all issued local court rules, not local administrative orders, governing landlord-tenant proceedings. Furthermore, MCL 600.5735(4) refers to local court rules, not local administrative orders. This makes sense, as a local administrative order can govern "only internal court management." MCR 8.112(B)(1). Mistakes such as this in an emergency order may be understandable, but the fact that this mistake has lingered for over two years underscores the importance of going through the normal notice and comment procedure before making changes to how our trial courts operate.

part). Furthermore, proposed MCR 4.201(F)(2) would provide for a different standard for using videoconferencing technology in landlord-tenant bench trials than the general standard for bench trials in other civil proceedings found in MCR 2.408(A)(2). Applying a different standard only to landlord-tenant bench trials is likely to cause confusion.[3]

Second, although I do not necessarily oppose requiring district courts to conduct a pretrial hearing at the initial date and time set for trial, I have concerns about the specifics of the proposed changes.[4] It is true that, for landlord-tenant cases that proceed to an actual trial, proposed MCR 4.201(K)(2)(b) purports to give district court judges the option of adjourning the matter or immediately proceeding to trial. But I am concerned that the presumption for holding pretrials via videoconference will operate as a de facto adjournment requirement. Unless the district court wishes to hold the bench trial via videoconference, and I suspect that many district court judges will not, the court will be forced to adjourn the trial because the parties will not be physically present at the courthouse for the initial hearing.

Third, I see no reason to change the conditions under which a district court may enter a default judgment. Proposed MCR 4.201(G)(5) would no longer allow a default judgment to be entered in a case involving nonpayment of rent if the defendant fails to appear at the initial court date unless he or she was personally served. I fail to understand why a landlord or landlord's attorney should be forced to return to court a second time to secure a judgment of possession if the tenant was properly served by some method other than personal service yet fails to appear at the initial hearing.[5]

Finally, I question the constitutionality of adding a provision requiring a stay in nonpayment-of-rent cases if the defendant has applied for rental assistance from a designated funding source. This blanket-rule requirement would strip district court judges of their discretion over whether to adjourn landlord-tenant proceedings granted to them by MCL 600.5732. As I have noted previously, our Legislature established a scheme for summary proceedings to recover possession of premises that allows a landlord to recover possession quicker in nonpayment-of-

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[3] It is also unclear to me what the practical difference is between "consult[ing] with the parties and counsel," which is the language used in proposed MCR 4.201(F)(2), and providing "all parties [with] notice and opportunity to be heard," which is the language used in the recently amended MCR 2.408(A)(2) and proposed MCR 4.201(F)(3).

[4] Holding a pretrial may lead to a resolution of the case without the necessity of a trial, which would benefit the parties and the court. Some of our district courts are undoubtedly already conducting pretrial hearings even though they are not currently required by the court rules.

[5] Additionally, proposed MCR 4.201(G)(5)(a)(i) is confusing in that it appears not to contemplate the possibility of the pretrial and trial both being held on the same date.

rent cases than in certain other cases. See Amendment of Administrative Order No. 2020-17, 507 Mich xcix, ciii (2021) (VIVIANO, J., dissenting). Automatic-stay requirements such as the one in the proposal published for comment do not respect the Legislature's choices and will force landlords wishing to exercise their statutory right to recover possession of their premises to wait until the stay is lifted. See *id*. at civ-cv. There is arguably a "clear legislative policy reflecting considerations other than judicial dispatch of litigation"—allowing a property owner to quickly recover possession of his or her property. *McDougall v Schanz*, 461 Mich 15, 30 (1999) (quotation marks and citations omitted). Thus, I question whether proposed MCR 4.201(I)(3) is within our constitutional authority to regulate "practice and procedure" or whether it wades into the Legislature's authority to amend substantive law. *McDougall*, 461 Mich at 30-31.

I am glad that the Court has returned to its normal process of publishing proposed changes to the court rules for comment before it makes a decision whether to adopt the changes. See Amendment of Administrative Order No. 2020-17, 507 Mich at ciii-cviii (VIVIANO, J., dissenting) (lamenting the Court's continued departure from our normal, transparent amendment processes and use of emergency orders to make substantive changes to landlord-tenant procedures). However, I have serious concerns about the proposed amendments the Court is currently considering. For these reasons, I respectfully dissent.

Order Entered September 14, 2022:

PROPOSED AMENDMENT OF MCR 2.002.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.002 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.002 WAIVER OF FEES FOR INDIGENT PERSONS

(A) Applicability and Scope.

(1)-(2) [Unchanged.]

(3) Waiver of filing fees for prisoners who are under the jurisdiction of the Michigan Department of Corrections is governed by MCL 600.2963 and as provided in this rule.

(3)-(5) [Renumbered (4)-(6) but otherwise unchanged.]

(B) Request for Waiver of Fees. A request to waive fees must accompany the documents the individual is filing with the court. If the request is being made by a prisoner under the jurisdiction of the Michigan Department of Corrections, the prisoner must also file a certified copy of their institutional account showing the current balance and a 12-month history of any deposits and withdrawals. The request must be on a form approved by the State Court Administrative Office entitled "Fee Waiver Request." Except as provided in subrule (K), no additional documentation may be required. The information contained on the form shall be nonpublic. The request must be verified in accordance with MCR 1.109(D)(3)(b) and may be signed either

(1)-(2) [Unchanged.]

(C)-(F) [Unchanged.]

(G) Order Regarding a Request to Waive Fees. A judge shall enter an order either granting or denying a request made under subrules (E) or (F) within three business days and such order shall be nonpublic. If required financial information is not provided in the waiver request, the judge may deny the waiver. An order denying shall indicate the reason for denial. The order granting a request must include a statement that the person for whom fees are waived is required to notify the court when the reason for waiver no longer exists.

(1) The clerk of the court shall send a copy of the order to the individual. Except as otherwise provided in this subrule, iIf the court denied the request, the clerk shall also send a notice that to preserve the filing date the individual must pay the fees within 14 days from the date the clerk sends notice of the order or the filing will be rejected. If the individual is a prisoner under the jurisdiction of the Michigan Department of Corrections, the clerk's notice shall indicate that the prisoner must pay the full or partial payment ordered by the court within 21 days from the date the clerk sends notice of the order or the filing will be rejected.

(2) De Novo Review of Fee Waiver Denials.

(a) Request for De Novo Review. Except as otherwise provided in this subrule, iIf the court denies a request for fee waiver, the individual may file a request for de novo review within 14 days of the notice denying the waiver. A prisoner under the jurisdiction of the Michigan Department of Corrections may file the de novo review request within 21 days of the notice denying the waiver. There is no motion fee for the request. A request for de novo review automatically stays the case or preserves the filing date until the review is decided. A de novo review must be held within 14 days of receiving the request.

(b)-(c) [Unchanged.]

(H)-(L) [Unchanged.]

Staff Comment (ADM File No. 2021-49): The proposed amendment of MCR 2.002 would provide procedural direction to courts regarding prisoner requests for fee waivers in civil actions.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-49. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered September 21, 2022:

PROPOSED AMENDMENTS OF MCR 2.002 AND 7.109.

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.002 and 7.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 2.002 WAIVER OF FEES FOR INDIGENT PERSONS

(A) Applicability and Scope.

(1) [Unchanged.]

(2) Except as otherwise provided in subrule (I), for the purposes of this rule, "fees" applies only to fees required by MCL 600.857, MCL 600.880, MCL 600.880a, MCL 600.880b, MCL 600.880c, MCL 600.1027, MCL 600.1986, MCL 600.2529, MCL 600.5756, MCL 600.8371, MCL 600.8420, MCL 700.2517, MCL 700.5104, and MCL 722.717. It also includes the cost of preparing a transcript for appeal.

(3)-(5) [Unchanged.]

(B)-(L) [Unchanged.]

RULE 7.109 RECORD ON APPEAL

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Unless otherwise provided by circuit court order or by subrule (e), or this subrule, the appellant shall order the full transcript of testimony and other proceedings in the trial court or agency. Under MCR 7.104(D)(2), a party must serve a copy of any request for transcript preparation on the opposing party and file a copy with the circuit court.

(b)-(d) [Unchanged.]

(e) If the court finds that the appellant from an agency decision is receiving public assistance, represented by a legal services program, or indigent as described in MCR 2.002(C), (D), or (F), the court must order transcripts prepared at public expense.

(C)-(I) [Unchanged.]

Staff Comment (ADM File No. 2016-10): The proposed amendments of MCR 2.002 and 7.109 would allow for waiver of appellate transcript fees for indigent individuals.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2016-10. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered September 21, 2022:

PROPOSED AMENDMENT OF MCR 6.112.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.112 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for

each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 6.112 THE INFORMATION OR INDICTMENT

(A)-(E) [Unchanged.]

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must contain, if applicable, any mandatory minimum sentence required by law as a result of the sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, arraignment is waived or eliminated as allowed under MCR 6.113(E), within 21 days after the filing of the information charging the underlying offense.

(G)-(H) [Unchanged.]

Staff Comment (ADM File No. 2021-32): The proposed amendment of MCR 6.112 would require that the notice of intent to seek an enhanced sentence contain any mandatory minimum sentence required by law as a result of the enhancement.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Orders page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-32. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered September 21, 2022:

PROPOSED AMENDMENT OF RULE 5 OF THE RULES FOR THE BOARD OF LAW EXAMINERS.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 5 of the Rules for the Board of Law Examiners.

Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 5 ADMISSION WITHOUT EXAMINATION

(A) An applicant for admission without examination must

(1)-(6) [Unchanged.]

(7) Definitions. For purposes of this rule, the following definitions apply.

(a) "Full-time" is 21 or more hours per week.

(b) "Instructor" includes a clinical instructor. A clinical instructor is someone whose responsibilities include teaching and supervising law students in a clinic organized by an accredited law school.

(B)-(F) [Unchanged.]

Staff Comment (ADM File No. 2021-40): The proposed amendment of Rule 5 of the Rules for the Board of Law Examiners would define the terms "full-time" and "instructor" to clarify that clinical instructors may be admitted to the bar without examination.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by January 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2021-40. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered October 26, 2022:

PROPOSED ADOPTION OF MCR 2.421.

On order of the Court, this is to advise that the Court is considering an addition of Rule 2.421 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

RULE 2.421 NOTICE OF BANKRUPTCY PROCEEDINGS

(A) Applicability. This rule applies to all pending state court actions in which a party is either:

(1) a named debtor in a bankruptcy proceeding; or

(2) an officer, director, or majority equity holder of a named debtor in a bankruptcy proceeding.

(B) Party Subject to Bankruptcy Proceeding. Any party in a pending state court action who is or becomes subject to a bankruptcy proceeding as provided in subrule (A) must file notice of the bankruptcy proceeding in the pending state court action no later than 7 days after becoming subject to bankruptcy proceedings.

(C) Other Parties. If a party to a pending state court action learns of a bankruptcy proceeding described in subrule (A) and notice of the bankruptcy proceeding has not previously been filed and served, the party that learned of the bankruptcy proceeding may file notice of the bankruptcy proceeding in the pending state court action.

(D) Notice Contents. Notice of a bankruptcy proceeding filed under this rule must, at a minimum, include all of the following:

(1) name(s) of the party described in subrule (A) and his or her designation as the named debtor, officer, director, or major equity holder of a named debtor;

(2) the court name and case number of the bankruptcy proceeding; and, if available,

(3) the name, telephone number, physical address, and email address for the debtor's attorney in the bankruptcy proceeding.

(E) Service of Notice. Notice of a bankruptcy proceeding filed under this rule must be served on all parties to the pending state court action as provided in MCR 2.107.

(F) Effect of Notice. If a notice is filed under this rule, the court may, on the motion of a party or on its own initiative, order the administrative closure of the state court action or set the matter for a status conference to determine if the case is subject to an automatic stay. If the state court action has been administratively closed under this subrule or otherwise, it may be reopened if, on the motion of a party or on the court's own initiative, the court determines that the automatic bankruptcy stay has been lifted, removed, or otherwise no longer impairs adjudication.

Staff Comment (ADM File No. 2021-50): The proposed addition of MCR 2.421 would address notice of a bankruptcy proceeding that affects a state court action.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by February 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-50. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered October 26, 2022:

PROPOSED AMENDMENTS OF MCR 3.977, 3.993, 7.311, AND 7.316.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.977, 3.993, 7.311, and 7.316 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.977 TERMINATION OF PARENTAL RIGHTS

(A)-(J) [Unchanged.]

(K) Review Standard. The clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights. On application in accordance with Chapter 7 of these rules, the Supreme Court may consider a claim of ineffective assistance of appellate counsel, and the Court will review such a claim using the standards that apply to criminal law.

RULE 3.993 APPEALS

(A)-(B) [Unchanged.]

(C) Procedure; Delayed Appeals.

(1) [Unchanged.]

(2) Ineffective Assistance of Appellate Counsel Claims. In accordance with MCR 7.316(D), the Supreme Court may consider a claim of ineffective assistance of appellate counsel in cases involving termination of parental rights.

(2) [Renumbered (3) but otherwise unchanged.]

(D)-(E) [Unchanged.]

RULE 7.311 MOTIONS IN SUPREME COURT

(A)-(G) [Unchanged.]

(H) Motion to Expand Record in Cases Involving Termination of Parental Rights. In a case involving termination of parental rights, a respondent who claims ineffective assistance of appellate counsel under MCR 7.316(D) may file a motion to expand the record to support that claim if appellate counsel's errors are not evident on the record. The motion must be filed no later than the date the application is due.

RULE 7.316 MISCELLANEOUS RELIEF

(A)-(C) [Unchanged.]

(D) Ineffective Assistance of Appellate Counsel Claims in Appeals Involving Termination of Parental Rights. If a respondent's application for leave to appeal raises the issue of ineffective assistance of appellate counsel, the Court may consider the claim. In making its determination and in addition to any other action allowed by these rules or law, the Court may take the following actions

(1) order the trial court to appoint new appellate counsel under MCR 3.993(D),

(2) allow the respondent time to retain new appellate counsel,

(3) grant a motion to expand the record under MCR 7.311(H), or

(4) remand the case to the Court of Appeals for a new appeal.

Staff Comment (ADM File No. 2022-05): The proposed amendments of MCR 3.977, 3.993, 7.311, and 7.316 would establish a procedure for

assessing whether a respondent in a termination of parental rights case was denied the effective assistance of appellate counsel, and if so, provide relief.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by February 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-05. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered October 26, 2022:

PROPOSED AMENDMENTS OF MCR 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217 AND 7.219.

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.201, 7.202, 7.203, 7.204, 7.205, 7.206, 7.207, 7.208, 7.209, 7.210, 7.211, 7.212, 7.213, 7.215, 7.216, 7.217, and 7.219 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.201 ORGANIZATION AND OPERATION OF COURT OF APPEALS

(A) Chief Judge and Chief Judge Pro Tempore.

(1) The Supreme Court ~~shall~~ selects a judge of the Court of Appeals to serve as chief judge. No later than October 1 of each odd-numbered

year, the Court of Appeals may submit the names of no fewer than two judges whom the judges of that court recommend for selection as chief judge.

(2) The chief judge ~~shall~~ selects a chief judge pro tempore, who ~~shall~~ fulfills such functions as the chief judge assigns.

(3) The chief judge and chief judge pro tempore ~~shall~~ serve a two-year term beginning on January 1 of each even-numbered year, provided that the chief judge serves at the pleasure of the Supreme Court and the chief judge pro tempore serves at the pleasure of the chief judge.

(B) Court of Appeals Clerk; ~~Place of~~ Filing of Documents; Forms of Documents; Signature~~Papers~~; Fees.

(1) The court ~~shall~~ appoints a chief clerk who is subject to the requirements imposed on the Supreme Court clerk in MCR 7.301(C). The clerk's office must be located in Lansing and be operated under the court's direction. With the court's approval, the clerk may appoint assistant and deputy clerks.

(2) The electronic filing of documents or data with the court is governed by MCR 1.109(G). Documents that are not electronically~~Papers to be~~ filed with the court ~~or the clerk~~ must be filed in the clerk's office ~~in Lansing or with a deputy clerk in Detroit, Troy, or Grand Rapids~~. Fees paid to a deputy clerk must be forwarded to the clerk's office in Lansing. Claims of appeal, applications, motions, and complaints need not be accepted for filing until all required documents have been filed and the requisite fees have been paid.

(3) [Unchanged.]

(C) [Unchanged.]

(D) Panels. The court ~~shall~~ sits to hear cases in panels of three~~3~~ judges. The decision of a majority of the judges of a panel in attendance at the hearing is the decision of the court. Except as modified by the Supreme Court, a decision of the court is final. The judges must be rotated so that each judge sits with every other judge with equal frequency, consistent with the efficient administration of the court's business. The Supreme Court may assign persons to act as temporary judges of the court, under the constitution and statutes. Only one temporary judge may sit on a three~~3~~-judge panel.

(E) Assignments and Presiding Judge. Before the calendar for each session is prepared, the chief judge will~~shall~~ assign the judges to each panel and the cases to be heard by them and designate one of them as presiding judge. A presiding judge presides at a hearing and performs other functions as directed by the court or the Supreme Court by rule or special order ~~directs~~. The chief judge may assign a motion or any other matter to any panel.

(F) Place of Hearing. The court ~~shall~~ sits in Detroit, Lansing, Grand Rapids, ~~and Marquette,~~ or another place the chief judge designates. A calendar case will be assigned for hearing in the city nearest to the court or tribunal from which the appeal was taken ~~or as the parties stipulate~~, except as otherwise required for the efficient administration of the court's business.

(G) Judicial Conferences. At least once a year and at other times the chief judge finds necessary, the judges willshall meet to transact any business that properly comes before them and to consider proposals to amend the rules of the court; and improve the administration of justice, including the operations of the court~~, and transact any business which properly comes before them~~.

(H) Approval of Expenses. The state court administrator mustshall approve the expenses for operation of the court and the expense accounts of the judges, including attendance at a judicial conference. The state court administrator mustshall prepare a budget for the court.

RULE 7.202 DEFINITIONS

For purposes of this subchapter:

(1) [Unchanged.]

(2) "date of filing" means the date of receipt of a document by the~~a court~~ clerk or if electronically filed, the date the document is deemed filed under MCR 1.109(G)(5)(b);

(3) [Unchanged.]

(4) "filing" means the delivery of a document to the~~a court~~ clerk and the receipt and acceptance of the document by the clerk with the intent to enter it in the record of the court or the electronic transmission of data and documents through the electronic filing system as provided in MCR 1.109(G);

(5) "custody case" means a domestic relations case in which the custody of a minor child is an issue, an adoption case, a child protective proceeding, or a delinquency case in which a dispositional order removing the minor from the minor's home is an issue;

(6) [Unchanged.]

RULE 7.203 JURISDICTION OF THE COURT OF APPEALS

(A)-(C) [Unchanged.]

(D) Other Appeals and Proceedings. The court has jurisdiction over any other appeal or action established by law. An order concerning the assignment of a case to the business court under MCL 600.8301 *et seq*. mayshall not be appealed to the Court of Appeals.

(E) [Unchanged.]

(F) Dismissal.

(1) [Unchanged.]

(2) The appellant or plaintiff may file a motion for reconsideration within 21 days after the date of the order of dismissal. The motion willshall be submitted to a panel of three~~3~~ judges. No entry fee is required for a motion filed under this subrule.

(3) The clerk will not accept for filing a motion for reconsideration of an order issued by a three~~3~~-judge panel that denies a motion for reconsideration filed under subrule (2).

RULE 7.204 FILING APPEAL OF RIGHT; APPEARANCE

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and

(A)(2), "entry" means the date a judgment or order is signed~~;~~ or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(a)-(c) [Unchanged.]

(d) an order deciding a postjudgment~~post-judgment~~ motion for a new trial, rehearing, reconsideration, or other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period.

(2) [Unchanged.]

(3) When~~Where~~ service of the judgment or order on appellant was delayed beyond the time stated in MCR 2.602, the claim of appeal must be accompanied by an affidavit setting forth facts showing that the service was beyond the time stated in MCR 2.602. Appellee may file an opposing affidavit within 14 days after being served with the claim of appeal and affidavit. If the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR 2.602 and the claim of appeal was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely.

(B) Manner of Filing. Except as otherwise provided in MCR 3.993(D)(3) and MCR 6.425(G)(1), t~~T~~o vest the Court of Appeals with jurisdiction in an appeal of right, an appellant must~~shall~~ file with the clerk within the time for taking an appeal

(1)-(2) [Unchanged.]

(C) Other Documents. With the claim of appeal, the appellant must~~shall~~ file the following documents with the clerk:

(1)-(6) [Unchanged.]

(D) Form of Claim of Appeal.

(1)-(2) [Unchanged.]

(3) If the case involves

(a)-(c) [Unchanged.]

that fact must be stated in capital letters on the claim of appeal. In an appeal specified in subrule (D)(3)(c), the Court of Appeals must expedite~~shall give expedited consideration to~~ the appeal, and~~;~~ if the state or an officer or agency of the state is not a party to the appeal, the Court of Appeals must~~shall~~ send copies of the claim of appeal and the judgment or order appealed from to the Attorney General.

(E) Trial Court Filing Requirements. Within the time for taking the appeal, the appellant must~~shall~~ file in the court or the tribunal from which the appeal is taken

(1)-(4) [Unchanged.]

(F) Other Requirements. Within the time for taking the appeal, the appellant must~~shall~~ also

(1)-(2) [Unchanged.]

(G) Appearance. Within 14 days after being served with the claim of appeal, the appellee may~~shall~~ file an appearance (identifying the individual attorneys of record) in the Court of Appeals and in the court

or tribunal from which the appeal is taken. An appellee who does not file a timely appearance is not entitled to notice of further proceedings until an appearance is filed.

(H) Docketing Statement. In all civil appeals, within 28 days after the claim of appeal is filed, the appellant must file ~~two copies of~~ a docketing statement with the court clerk ~~of the Court of Appeals~~ and serve a copy on the opposing parties.

(1)-(2) [Unchanged.]

(3) Cross-~~-~~Appeals. A party who files a cross-~~-~~appeal must~~shall~~ file a docketing statement in accordance with this rule within 28 days after filing the cross-~~-~~appeal.

(4) Dismissal. Failure~~If the appellant fails~~ to file a timely docketing statement~~, the chief judge~~ may result in dismissal of the appeal or cross-appeal under~~pursuant to~~ MCR 7.217.

RULE 7.205 APPLICATION FOR LEAVE TO APPEAL

(A) [Unchanged.]

(B) Manner of Filing. To apply for leave to appeal, the appellant must~~shall~~ file with the clerk:

(1) ~~5 copies of~~ an application for leave to appeal ~~(one signed),~~ stating the date and nature of the judgment or order appealed from; concisely reciting the appellant's allegations of error and the relief sought; setting forth a concise argument, conforming to MCR 7.212(B) and (C), in support of the appellant's position on each issue; and, if the order appealed from is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2) ~~5 copies of~~ the judgment or order appealed from;~~, of~~ the register of actions of the lower court, tribunal, or agency;~~, of~~ the opinion or findings of the lower court, tribunal, or agency;~~,~~ and ~~of~~ any opinion or findings reviewed by the lower court, tribunal, or agency;~~.~~

(3) [Unchanged.]

(4) a~~1~~ copy of certain transcripts, as follows:

(a) in an appeal relating to the evidence presented at an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court that~~which~~ conducted the hearing;

(b)-(g) [Unchanged.]

If the transcript is not yet available, or if there is no record to be transcribed, the appellant must~~shall~~ file a copy of the certificate of the court reporter or recorder or a statement by the appellant's attorney as provided in MCR 7.204(C)(2). As soon as the transcript is available, t~~T~~he appellant must file it~~the transcript~~ with the Court of Appeals ~~as soon as it is available~~.

(5)-(6) [Unchanged.]

(C) Answer. Any other party in the case may file with the clerk, within 21 days of service of the application,

(1) ~~5 copies of~~ an answer to the application ~~(one signed)~~ conforming to MCR 7.212(B) and (D), except that transcript page references are not required unless a transcript has been filed; and

(2) [Unchanged.]

(D) [Unchanged.]

(E) Decision.

(1)-(2) [Unchanged.]

(3) If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross-appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days), and the filing of the court reporter's or recorder's certificate if the transcript has not been filed (14 days), run from the date the order granting leave is certified.

(4) [Unchanged.]

(F) [Unchanged.]

RULE 7.206 EXTRAORDINARY WRITS, ORIGINAL ACTIONS, AND ENFORCEMENT ACTIONS

(A)-(C) [Unchanged.]

(D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff must~~shall~~ file with the clerk:

(a) ~~5 copies of~~ a complaint ~~(1 signed)~~, which may have ~~copies of~~ supporting documents or affidavits attached ~~to each copy~~;

(b) ~~5 copies of~~ a supporting brief ~~(1 signed)~~ conforming to MCR 7.212(B) and (C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every ~~named~~ defendant and, in a superintending control action, on any other party involved in the case that~~which~~ gave rise to the complaint for superintending control; and

(d) [Unchanged.]

(2) Answer. A~~the~~ defendant or any other interested party must file with the clerk within 21 days of service of the complaint ~~and any supporting documents or affidavits~~:

(a) ~~5 copies of~~ an answer to the complaint ~~(1 signed)~~, which may have ~~copies of~~ supporting documents or affidavits attached ~~to each copy~~;

(b) a supporting~~5 copies of an opposing~~ brief ~~(1 signed)~~ conforming to MCR 7.212(B) and (D) to the extent possible; and

(c) [Unchanged.]

~~(3) Electronic Filing. The parties may file all pleadings and other papers permitted by this rule electronically with the Court of Appeals. All electronically filed documents must be in PDF digital format, while appendices and other nonoriginal filings may be scanned. All electronic filings must be submitted in accordance with the instructions set forth on the website of the Michigan Court of Appeals. Pro se parties may file pleadings and other papers in paper form.~~

(43) Preliminary Hearing. There is no oral argument on preliminary hearing of a complaint. The court may deny relief, grant peremptory

relief, or allow the parties to proceed to full hearing on the merits in the same manner as an appeal of right either with or without referral to a judicial circuit or tribunal or agency for the taking of proofs and report of factual findings. If the case is ordered to proceed to full hearing, the time for filing a brief by the plaintiff begins to run from the date the order allowing the case to proceed is certified or the date the transcript or report of factual findings on referral is filed, whichever is later. The plaintiff's brief must conform to MCR 7.212(B) and (C). An opposing brief must conform to MCR 7.212(B) and (D). In a habeas corpus proceeding, the prisoner need not be brought before the Court of Appeals.

(E) Actions to Enforce the Headlee Amendment, UnderPursuant to Const 1963, art 9, § 32.

(1) Filing of Complaint. To commence an action underpursuant to Const 1963, art 9, § 32, the plaintiff mustshall file with the clerk:

(a) a5 copies of the complaint (1 signed), which conforms with the special pleading requirements of MCR 2.112(M) and indicates, inter alia, whether there are any factual questions that are anticipated to require resolution by the court and whether the plaintiff(s) anticipate(s) the need for discovery and the development of a factual record;

(b) 5 copies of a supporting brief (1 signed) conforming to MCR 7.212(B) and (C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every named defendant and the office of the attorney general; and

(d) [Unchanged.]

(2) Answer. AThe named defendant(s) mustshall file with the clerk within 21 days of service of the complaint:

(a) 5 copies of an answer to the complaint (1 signed), which conforms with the special pleading requirements of MCR 2.112(M) and indicates, inter alia, whether there are any factual questions that are anticipated to require resolution by the court and whether athe named defendant(s) anticipate(s) the need for discovery and the development of a factual record;

(b) 5 copies of a supporting brief (1 signed) conforming to MCR 7.212(B) and (C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every named plaintiff.

(3) Subsequent proceedings. Following receipt of the answer:

(a) the chief clerk mustshall promptly select a panel of the court by random draw and assign that panel to commence proceedings in the suit; and

(b) [Unchanged.]

(c) if the panel of the court determines that the issues framed in the parties' pleadings and supporting briefs solely present jurisprudentially significant questions of law, the panel mustshall direct that the suit proceed to a full hearing on the merits in the same manner as an appeal as of right and notify the parties of the date for the filing of supplemental briefs, if such briefs are determined to be necessary, and of the date for oral argument, which mustshall be on an expedited basis; or

(d) if the panel of the court determines that the issues framed in the parties' pleadings and supplemental briefs present factual questions for resolution, the panel mustshall refer the suit to a judicial circuit for the purposes of holding pretrial proceedings, conducting a hearing to receive evidence and arguments of law, and issuing a written report for the panel setting forth proposed findings of fact, and conclusions of law. The proceedings before the circuit court mustshall proceed as expeditiously as due consideration of the circuit court's docket, facts and issues of law requires. Following the receipt of the report from the circuit court, the panel mustshall notify counsel for the parties of the schedule for filing briefs in response to the circuit court's report and of the date for oral argument, which mustshall be on an expedited basis.

(F) Enforcement of Administrative Tribunal or Agency Orders.

(1) Complaint. To obtain enforcement of a final order of an administrative tribunal or agency, the plaintiff mustshall file with the clerk within the time limit provided by law:

(a) 5 copies of a complaint (one signed) concisely stating the basis for relief and the relief sought;

(b) 5 copies of the order sought to be enforced;

(c) 5 copies of a supporting brief (one signed) which conformings to MCR 7.212(B) and (C) to the extent possible;

(d) a notice of preliminary hearing on the complaint on the first Tuesday at least 21 days after the complaint and supporting documents are served on the defendant, the agency (unless the agency is the plaintiff), and any other interested party;

(e)-(g) [Relettered (d)-(f) but otherwise unchanged.]

(2) Answer. AThe defendant ormust file, and any other interested party mustmay file, with the clerk within 21 days of service of the complaintbefore the date of the preliminary hearing:

(a) 5 copies of an answer to the complaint (one signed);

(b) a supporting5 copies of an opposing brief (one signed) conforming to MCR 7.212(B) and (D) to the extent possible; and

(c) [Unchanged.]

(3) Preliminary Hearing. There is no oral argument on preliminary hearing of a complaint. The court may deny relief, grant peremptory relief, or allow the parties to proceed to full hearing on the merits in the same manner as an appeal of right. If the case is ordered to proceed to full hearing, the time for filing of a brief by the plaintiff begins to run from the date the clerk certifies the order allowing the case to proceed. The plaintiff's brief must conform to MCR 7.212(B) and (C). An opposing brief must conform to MCR 7.212(B) and (D). The case is heard on the certified record transmitted by the tribunal or agency. MCR 7.210(A)(2), regarding the content of the record, applies.

RULE 7.207 CROSS-APPEALS

(A) Right of Cross-Appeal.

(1) When an appeal of right is filed or the court grants leave to appeal, any appellee may file a cross-appeal.

(2) If there is more than one~~1~~ party plaintiff or defendant in a civil action and one~~1~~ party appeals, any other party, whether on the same or opposite side as the party first appealing, may file a cross-appeal against all or any of the other parties to the case as well as against the party who first appealed. If the cross-appeal operates against a party not affected by the first appeal or in a manner different from the first appeal, that party may file a further cross-appeal as if the cross-appeal affecting that party had been the first appeal.

(B) Manner of Filing. To file a cross-appeal, the cross-appellant must~~shall~~ file with the clerk a claim of cross-appeal in the form required by MCR 7.204(D) and the entry fee

(1) within 21 days after the claim of appeal is filed with the Court of Appeals or served on the cross-appellant, whichever is later, if the first appeal was of right; or

(2) [Unchanged.]

The cross-appellant must~~shall~~ file proof that a copy of the claim of cross-appeal was served on the cross-appellee and any other party in the case. A copy of the judgment or order from which the cross-appeal is taken must be filed with the claim.

(C) Additional Requirements. The cross-appellant must~~shall~~ perform the steps required by MCR 7.204(E) and (F), except that the cross-appellant is not required to order a transcript or file a court reporter's or recorder's certificate unless the initial appeal is abandoned or dismissed. Otherwise the cross-appeal proceeds in the same manner as an ordinary appeal.

(D) Abandonment or Dismissal of Appeal. If the appellant abandons the initial appeal or the court dismisses it, the cross-appeal may nevertheless be prosecuted to its conclusion. Within 21 days after the clerk certifies the order dismissing the initial appeal, if there is a record to be transcribed, the cross-appellant must~~shall~~ file a certificate of the court reporter or recorder that a transcript has been ordered and payment for it made or secured and will be filed as soon as possible or has already been filed.

(E) Delayed Cross-Appeal. A party seeking leave to take a delayed cross-appeal must~~shall~~ proceed under MCR 7.205.

RULE 7.208 AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM

(A) [Unchanged.]

(B) Postjudgment Motions in Criminal Cases.

(1)-(2) [Unchanged.]

(3) The trial court must~~shall~~ hear and decide the motion within 56 days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment.

(4) [Unchanged.]

(5) If the motion is granted in whole or in part,

(a) [Unchanged.]

(b) the prosecuting attorney may file a cross-appeal in the manner provided by MCR 7.207 within 21 days after the trial court's decision. If

the defendant has withdrawn the appeal before the prosecuting attorney has filed a cross-appeal, the prosecuting attorney may file a claim of appeal or an application for leave to appeal within the 21-day period.

(6) If the motion is denied, defendant-appellant's brief must be filed within 42 days after the decision by the trial court, or the filing of the transcript of any trial court hearing, whichever is later.

(C)-(J) [Unchanged.]

RULE 7.209 BOND; STAY OF PROCEEDINGS

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1)-(3) [Unchanged.]

(4) When the bond is filed under subsection (E)(2)(a), the judgment or order is~~shall~~ automatically ~~be~~ stayed pending entry of a final order under subsection (G).

(5)-(6) [Unchanged.]

(7) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings are~~shall be~~ stayed during the pendency of the appeal, unless the Ccourt of Appeals directs otherwise.

(F) Conditions of Stay Bond.

(1) Civil Actions and Probate Proceedings. In a bond filed for stay pending appeal in a civil action or probate proceeding, the appellant must~~shall~~ promise in writing:

(a)-(e) [Unchanged.]

(2) Criminal Cases. A criminal defendant for whom bond pending appeal is allowed after conviction must~~shall~~ promise in writing:

(a)-(f) [Unchanged.]

(G) Sureties and Filing of Bond; Service of Bond; Objections; Stay Orders. Except as otherwise specifically provided in this rule, MCR 3.604 applies. A bond must be filed with the clerk of the court that entered the order or judgment to be stayed.

(1) Civil Actions and Probate Proceedings.

(a) A copy of a bond and any accompanying power of attorney or affidavit must be promptly served on all parties in the manner prescribed in MCR 2.107. At the same time, the party seeking the stay must~~shall~~ file a proposed stay order under~~pursuant to~~ MCR 2.602(B)(3). Proof of service must be filed promptly with the trial court in which the bond has been filed.

(b) Objections must~~shall~~ be filed and served within seven~~7~~ days after service of the bond. Objections to the amount of the bond are governed by MCR 2.602(B)(3). Objections to the surety are governed by MCR 3.604(E).

(c) If no timely objections to the bond, surety, or stay order are filed, the trial court must~~shall~~ promptly enter the order staying enforcement of the judgment or order pending all appeals. The stay ~~shall~~ continues until otherwise ordered by the trial court or an appellate court.

(d)-(g) [Unchanged.]

(2) Criminal Cases. A criminal defendant filing a bond after conviction must~~shall~~ give notice to the county prosecuting attorney of the time and place the bond will be filed. The bond is subject to the objection procedure provided in MCR 3.604.

(H) [Unchanged.]

(I) Ex Parte Stay. Whenever an ex parte stay of proceedings is necessary to allow a motion in either the trial court or the Court of Appeals, the court before which the motion will be heard may grant an ex parte stay for that purpose. Service of a copy of the order, with a copy of the motion, any affidavits on which the motion is based, and notice of hearing on the motion, ~~shall~~ operates as a stay of proceedings until the court rules on the motion unless the court supersedes or sets aside the order in the interim. Proceedings may not be stayed for longer than necessary to enable the party to make the motion according to the practice of the court~~,~~ and, if made, until the decision of the court.

RULE 7.210 RECORD ON APPEAL

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, the record consists of the original documents~~papers~~ filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. In an appeal from probate court in an estate or trust proceeding, an adult or minor guardianship proceeding under the Estates and Protected Individuals Code, or a proceeding under the Mental Health Code, only the order appealed from and those petitions, opinions, and other documents pertaining to it need be included.

(2)-(4) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.993(E) or MCR 6.425(G), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant must~~shall~~ order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b) [Unchanged.]

(c) On the appellant's motion, with notice to the appellee, the trial court or tribunal may order that some portion less than the full transcript (or no transcript at all) be included in the record on appeal. The motion must be filed within the time required for filing an appeal, and~~,~~ if the motion is granted, the appellee may file any portions of the transcript omitted by the appellant. The filing of the motion extends the time for filing the court reporter's or recorder's certificate until seven~~7~~ days after entry of the trial court's or tribunal's order on the motion.

(d)-(e) [Unchanged.]

(2) Transcript Unavailable. When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant must~~shall~~ take the following steps to settle the record and to cause the filing of a certified settled statement of facts to serve as a substitute for the transcript.

(a) No later than 56 days after the filing of the available transcripts, or 28 days after the filing of the available transcripts in a child custody case or interlocutory criminal appeal, or, if no transcripts are available, within 14 days after filing the claim of appeal, the appellant must~~shall~~ file with the trial court or tribunal clerk~~,~~ and serve on each appellee~~,~~ a motion to settle the record and, where reasonably possible, a proposed statement of facts. A proposed statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to provide for appellate review.

(b) Except as otherwise provided, the appellant must~~shall~~ notice the motion to settle the record for hearing before the trial court or tribunal to be held within 21 days of the filing of the motion. If it is not the typical practice of a tribunal to conduct hearings, the motion to settle the record must be filed with the tribunal for consideration by the tribunal within 21 days of the filing of the motion. The motion must~~shall~~ be filed and served at least 14 days before the date noticed for hearing or consideration to settle the record. If appellant filed a proposed statement of facts with the motion, appellee must file and serve on the appellant and other appellees an amendment or objection to the proposed statement of facts in the trial court or tribunal at least seven~~7~~ days before the time set for the settlement hearing or consideration. The trial court may adopt and file the appellant's proposed statement of facts as the certified settled statement of facts.

(c) The trial court or tribunal must~~shall~~ settle any controversy and certify a settled statement of facts as an accurate, fair, and complete statement of the proceedings before it. The certified settled statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to provide for appellate review.

(d) The appellant must~~shall~~ file the settled statement of facts and the certifying order with the trial court or tribunal clerk and Court of Appeals.

(3) Duties of Court Reporter or Recorder.

(a) Certificate. Within seven~~7~~ days after a transcript is ordered by a party or the court, the court reporter or recorder must file~~shall furnish~~ a certificate stating:

(i)-(iii) [Unchanged.]

(b) Time for Filing. The court reporter or recorder must~~shall~~ give precedence to transcripts necessary for interlocutory criminal appeals and custody cases. The court reporter or recorder must~~shall~~ file the transcript with the trial court or tribunal clerk within

(i)-(iv) [Unchanged.]

The Court of Appeals may extend or shorten these time limits in an appeal pending in the court on motion filed by the court reporter or recorder or a party.

(c) [Unchanged.]

(d) Form of Transcript. The transcript must be filed in one or more volumes ~~under a hard-surfaced or other suitable cover,~~ stating the title of the action, and prefaced by a table of contents showing the subject matter of the transcript with page references to the significant parts of the trial or proceedings, including the testimony of each witness by name, the arguments of the attorneys, and the jury instructions. The pages of the transcript must be consecutively numbered on the bottom of each page. Transcripts filed with the court must contain only a single transcript page per document page, not multiple pages combined on a single document page.

(e) Notice. Immediately after the transcript is filed, the court reporter or recorder must~~shall~~ notify the Court of Appeals and all parties that it has been filed and file in the Court of Appeals an affidavit of mailing of notice to the parties.

(f) [Unchanged.]

~~(g) Responsibility When More Than One Reporter or Recorder. In a case in which portions of the transcript must be prepared by more than one reporter or recorder, unless the court has designated another person, the person who recorded the beginning of the proceeding is responsible for ascertaining that the entire transcript has been prepared, filing it, and giving the notice required by subrule (B)(3)(e).~~

(C) Exhibits. Within 21 days after the claim of appeal is filed, a party possessing any exhibits offered in evidence, whether admitted or not, must~~shall~~ file them with the trial court or tribunal clerk, unless by stipulation of the parties or order of the trial court or tribunal they are not to be sent, or copies, summaries, or excerpts are to be sent. ~~Xerographic c~~Copies of exhibits may be filed in lieu of originals unless the trial court or tribunal orders otherwise. When the record is returned to the trial court or tribunal, the trial court or tribunal clerk must~~shall~~ return the exhibits to the parties who filed them.

(D) Reproduction of Records. Where facilities for the copying or reproduction of records are available to the clerk of the court or tribunal whose action is to be reviewed, the clerk, on a party's request and on deposit of the estimated cost or security for the cost, must~~shall~~ procure for the party as promptly as possible and at the cost to the clerk the requested number of copies of documents, transcripts, and exhibits on file.

(E) Record on Motion. If, before the time the complete record on appeal is sent to the Court of Appeals, a party files a motion that requires the Court of Appeals to have the record, the trial court or tribunal clerk must~~shall~~, on request of a party or the Court of Appeals, send the Court of Appeals the documents needed.

(F) Service of Record. Within 21 days after the transcript is filed with the trial court clerk, the appellant must~~shall~~ serve a copy of the entire record on appeal, including the transcript and exhibits, on each appellee. However, copies of documents the appellee already possesses

need not be served. Proof that the record was served must be promptly filed with the Court of Appeals and the trial court or tribunal clerk. If the filing of a transcript has been excused as provided in subrule (B), the record is to be served within 21 days after the filing of the transcript substitute.

(G) Transmission of Record. Within 21 days after the briefs have been filed or the time for filing the appellee's brief has expired, or when the court requests, the trial court or tribunal clerk must~~shall~~ send to the Court of Appeals the record on appeal in the case pending on appeal, except for those things omitted by written stipulation of the parties. Weapons, drugs, or money are not to be sent unless the Court of Appeals requests. The trial court or tribunal clerk must~~shall~~ append a certificate identifying the name of the case and the documents~~papers~~ with reasonable definiteness and must~~shall~~ include as part of the record:

(1)-(3) [Unchanged.]

Transcripts and all other documents that~~which~~ are part of the record on appeal must be included in the record and, if filed in print, must be attached in one or more file folders or other suitable hard-surfaced binders showing the name of the trial court or tribunal, the title of the case, and the file number.

(H) Return of Record Filed in Printed Form. If the record was filed in printed form, a~~A~~fter the Court of Appeals disposes of the~~an~~ appeal, the clerk~~Court of Appeals~~ must~~shall~~ promptly send it to~~the original record, together with a certified copy of the opinion, judgment, or order entered by the Court of Appeals,~~

(1) ~~to~~ the Clerk of the Supreme Court on request if an application for leave to appeal is filed in the Supreme Court, or

(2) ~~to~~ the clerk of the court or tribunal from which it was received when

(a) [Unchanged.]

(b) the period for filing a motion for reconsideration in the Court of Appeals has expired and any timely-filed motion has been resolved, and~~there is pending in the Court of Appeals no~~

~~(i) timely motion for reconsideration,~~

~~(ii) timely petition for a special panel under MCR 7.215 (I), or~~

~~(iii) timely request by a judge of the Court of Appeals for a special panel under MCR 7.215 (I),~~

~~and the period for such a timely motion, petition, or request has expired.~~

(c) the period for initiation of a special panel under MCR 7.215(J) has expired and any proceedings under that subrule are concluded.

(I) Disposition of Record Filed in Electronic Form. If the record is filed in electronic form, the Court of Appeals may dispose of the electronic record according to the standards established by the court.

(J~~I~~) Notice by Trial Court or Tribunal Clerk. In order that the parties may take the appropriate action in the trial court or tribunal under the Court of Appeals judgment, t~~T~~he trial court or tribunal clerk must~~shall~~ promptly notify all parties of the return of the record, if filed in printed form, or of the expiration of the time under subrule (H)(2) if

the record was filed in electronic form~~in order that they may take the appropriate action in the trial court or tribunal under the Court of Appeals mandate~~.

RULE 7.211 MOTIONS IN COURT OF APPEALS

(A) Manner of Making Motion. A motion is made in the Court of Appeals by filing:

(1) ~~5 copies of~~ a motion ~~(one signed)~~ stating briefly but distinctly the facts and the grounds on which it is based and the relief requested;

(2) [Unchanged.]

(3) for a motion to dismiss, to affirm, or for peremptory reversal, ~~5 copies of~~ a supporting brief. A supporting brief may be filed with any other motion. A brief must conform to MCR 7.212(B) and (C) as nearly as possible, except that page references to a transcript are not required unless the transcript is relevant to the issue raised in the motion. A brief ~~in conformance with MCR 7.212(C)~~ is not required in support of a motion to affirm when the appellant argues that:

(a)-(c) [Unchanged.]

(d) a sentence that~~which~~ is within the sentencing guidelines is invalid.

Instead of a brief in support of a motion to affirm in such a circumstance, the movant may append those portions of the transcript that are pertinent to the issues raised in the motion; in that case, the motion must include a summary of the movant's position;

(4) a motion for immediate consideration under subrule (C)(6) if the party wants a decision on the motion~~desires a hearing~~ on a date earlier than the answer~~applicable~~ date set forth in subrules (B)(2)(a)-(e);

(5) proof that ~~a copy of~~ the motion, the motion for immediate consideration if one has been filed, and any ~~other~~ supporting document~~spapers~~ were served on all other parties to the appeal.

(B) Answer.

(1) A party to an appeal may answer a motion by filing:

(a) ~~5 copies of~~ an answer ~~(one signed);~~ and

(b) proof that ~~a copy of~~ the answer and any supporting document~~sother opposing papers~~ were served on all other parties to the appeal.

(2) Subject to subrule (3), the answer must be filed within

(a) 21 days after the motion is served on the other parties~~,~~ for a motion to dismiss, to remand, or to affirm;

(b) 35 days after the motion is served on the appellee~~,~~ if the motion is for peremptory reversal;

(c) 56 days after the motion is served on the defendant~~,~~ for a motion to withdraw as the appointed appellate attorney;

(d) 14 days after the motion is served on the other parties~~,~~ for a motion for reconsideration of an opinion or an order, to stay proceedings in the trial court, to strike a full or partial pleading on appeal, to file an amicus brief, to hold an appeal in abeyance, or to reinstate an appeal after dismissal under MCR 7.217(D);

(e) seven~~7~~ days after the motion is served on the other parties~~,~~ for all other motions.

If a motion for immediate consideration has been filed, ~~all~~ answers to all affected motions must be filed within seven~~7~~ days ~~if the motions for immediate consideration was served by mail,~~ or within such time as the Court of Appeals directs. See subrule (C)(6).

(3) In its discretion, the Court of Appeals may dispose of the following motions before the answer period has expired: a motion to extend time to order or file transcripts, to extend time to file a brief or other appellate pleading, to substitute one attorney for another, for oral argument when the right to oral argument was not otherwise preserved as described in MCR 7.212, or for an out-of-state attorney to appear and practice in Michigan.

(4) A supporting~~Five copies of an opposing~~ brief may be filed with the answer. A brief must conform to MCR 7.212(B) and (D) as nearly as possible, except that page references to a transcript are not required unless the transcript is relevant to the issue raised in the motion.

(C) Special Motions. ~~If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.~~

(1) Motion to Remand.

(a)-(d) [Unchanged.]

(e) If the trial court grants the appellant relief in whole or in part,

(i) u~~U~~nless the Court of Appeals orders otherwise, appellant must file the brief on appeal or notice of withdrawal of appeal within 21 days after the trial court's decision or after the filing of the transcript of any hearing held, whichever is later.

(ii) t~~T~~he appellee may file a cross-appeal in the manner provided by MCR 7.207 within 21 days after the trial court's decision. If the appellant has withdrawn the appeal before the appellee has filed a cross-appeal, the appellee may file a claim of appeal or an application for leave to appeal within the 21-day period.

(f) If the trial court denies the appellant's request for relief, appellant's brief must be filed within 21 days after the decision by the trial court~~,~~ or the filing of the transcript of any trial court hearing, whichever is later.

(2)-(4) [Unchanged.]

(5) Motion to Withdraw. A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous.

(a) A motion to withdraw is made by filing:

(i) ~~5 copies of~~ a motion to withdraw that~~(one signed) which~~ identifies any points the appellant seeks to assert and any other matters that the attorney has considered as a basis for appeal;

(ii) ~~5 copies of~~ a brief conforming to MCR 7.212(B) and (C)~~, which~~ that refers to anything in the record that might arguably support the

appeal, contains relevant record references, and discussescites and deals with those authorities thatwhich appear to bear on the points in question;

(iii) [Unchanged.]

(iv) proof that a copy of the motion only and not the brief was served on the appellee.

(b) If the appeal is available only by leave of the court, the motion mustshall be filed within 56 days after the transcript is filed or within the deadline for filing a late application for leave to appeal, whichever comes first. The filing of such a motion, with the accompanying brief required by MCR 7.211(C)(5)(a)(ii), mustshall be treated as the filing of an application for leave to appeal on behalf of the appellant.

(c) [Unchanged.]

(d) If the court finds that the appeal is wholly frivolous, it may grant the motion and affirm the conviction or trial court judgment in appeals by right or deny leave to appeal in appeals by leave. If the court affirms the conviction or trial court judgment or denies leave to appeal, the appellant's attorney mustshall mail to the appellant a copy of the transcript within 14 days after the order affirming is certified and file proof of that service. If the court finds any legal point arguable on its merits, it may deny the motion and order the court appointed attorney to proceed in support of the appeal or grant the motion and order the appointment of substitute appellate counsel to proceed in support of the appeal.

(6) Motion for Immediate Consideration. A party may file a motion for immediate consideration to expedite decisionhearing on another motion. The motion must state facts showing why immediate consideration is required. If a copy of the motion for immediate consideration and a copy of the motion of which immediate consideration is sought are served by electronic service under MCR 1.109(G)(6) or personally served under MCR 2.107(C)(1) or (2), the motions may be submitted to the court immediately on filing. If mail service is used, motions may not be submitted until the first Tuesday seven7 days after the date of service, unless the party served acknowledges receipt. The trial court or tribunal record need not be requested unless it is required as to the motion of which immediate consideration is sought.

(7) Confession of Error by Prosecutor. In a criminal case, if the prosecutor concurs in the relief requested by the defendant, the prosecutor mustshall file a confession of error andso indicating, which may state reasons why concurrence in the relief requested is appropriate. The confession of error willshall be submitted to one judge underpursuant to MCR 7.211(E). If the judge approves the confession of error, the judge willshall enter an order or opinion granting the relief. If the judge rejects the confession of error, the case willshall be submitted for decision through the ordinary processes of the court, and the confession of error willshall be submitted to the panel assigned to decide the case.

(8) [Unchanged.]

(9) Motion to Seal Court of Appeals File in Whole or in Part.

(a)-(b) [Unchanged.]

(c) Except as otherwise provided by statute or court rule, the procedure for sealing a Court of Appeals file is governed by MCR 8.119(I). Materials that are subject to a motion to seal a Court of Appeals file in whole or in part must~~shall~~ be held under seal pending the court's disposition of the motion.

(d) Any party or interested person may file an answer in response to a motion to seal a Court of Appeals file within seven~~7~~ days after the motion is served on the other parties, or within seven~~7~~ days after the motion is filed in the Court of Appeals, whichever is later.

(e) An order granting a motion must~~shall~~ include a finding of good cause, as defined by MCR 8.119(I)(2), and a finding that there is no less -restrictive means to adequately and effectively protect the specific interest asserted.

(f) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 7.212 BRIEFS

(A)-(C) [Unchanged.]

(D) Appellee's Brief; Contents.

(1)-(2) [Unchanged.]

(3) Unless under the headings "Statement of Questions Involved" and "Statement of Facts" the appellee accepts the appellant's statements, the appellee must~~shall~~ include:

(a)-(b) [Unchanged.]

(E) Briefs in Cross--Appeals. The filing and service of briefs by a cross--appellant and a cross--appellee are governed by subrules (A)-(D).

(F) Supplemental Authority. Without leave of the court, a party may file a one-page communication, titled "supplemental authority," to call the court's attention to new authority released after the party filed its brief. Such a communication,

(1)-(3) [Unchanged.]

(G) [Unchanged.]

(H) Amicus Curiae.

(1)-(2) [Unchanged.]

(3) Except for briefs presented on behalf of amicus curiae listed in MCR 7.312(H)(2), a brief filed under this rule must~~shall~~ indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief~~;~~ and must~~shall~~ identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution. The disclosure must~~shall~~ be made in the first footnote on the first page of text.

(I) Nonconforming Briefs. If, on its own initiative or on a party's motion, the court concludes that a brief does not substantially comply with the requirements in this rule, the court~~it~~ may order the party who filed the brief to file a supplemental brief within a specified time correcting the deficiencies, or it may strike the nonconforming brief.

(J) Appendix.

(1) Requirements. Except as provided in subrules (1)(a)-(f) of this rule, the appellant must file an individual or joint appendix with the appellant's brief. An appellee may file an appendix with the appellee's brief if the appellant's appendix does not contain all the information set forth in subrule (3) of this rule. The appellee's appendix should not contain any of the documents contained in the appellant's appendix except when including additional pages to provide a more complete context, but should only contain additional information described in subrule (3) that is relevant and necessary to the determination of the issues on appeal. To avoid duplication in cases with more than one appellant or appellee, the parties are encouraged to submit a joint appendix underpursuant to subsection (4) rather than separate appendixes. An appendix is not required in appeals from:

(a)-(e) [Unchanged.]

(f) The Michigan Public Service Commission where the record is available on the cCommission's e-docket, or the Michigan Tax Tribunal where the record is available on the tTribunal's tax docket lookup page. In those cases, the parties' briefs mustshall cite to the document number and relevant pages in the electronic record.

(2) [Unchanged.]

(a) For an appendix filed in paper form, one signed copy that is separately bound from the brief mustshall be filed. Each separate document in the appendix must be preceded by a title page that identifies the appendix number or letter and the title of the document. The binding method should allow the easy dismantling of the appendix for scanning.

(b) [Unchanged.]

(3) [Unchanged.]

(4) Joint Appendix.

(a) The parties may stipulate to using a joint appendix, so designated, containing the matters that are deemed necessary to fairly decide the questions involved. A joint appendix mustshall meet the requirements of subrules (J)(2)and (3) and mustshall be included with the initial appellant's brief or, for a joint appendix of multiple appellees, with the first appellee's brief to be filed.

(b) [Unchanged.]

RULE 7.213 CALENDAR CASES

(A) Mediation in Calendar Cases.

(1) Selection for Mediation.

(a) [Unchanged.]

(b) To identify cases for mediation, the Court of Appeals will review civil appeals to determine if mediation would be of assistance to the court or the parties. At any time, a party to a pending civil appeal may file a written request that the appeal be submitted to mediation. Such a request may be made without formal motion and isshall beconfidential.

(c) A party to a case that has been selected for mediation may file a request to have the case removed from mediation. Such a request may be made without formal motion and isshall be confidential. If the

request to remove is premised on a desire to avoid the cost of mediation, it is not necessary to demonstrate an inability to pay such costs.

(d) [Unchanged.]

(2) Mediation Procedure.

(a) Mediation mustshall be conducted by a mediator selected by stipulation of the parties or designated by the court. A mediator designated by the court mustshall be an attorney, licensed in Michigan, who has met the qualifications of mediators provided in MCR 2.411(F).

(b) Mediation mustshall consider the possibility of settlement, the simplification of the issues, and any other matters that the mediator determines may aid in the handling or disposition of the appeal.

(c) The order referring the case to mediation mustshall specify the time within which the mediation is to be completed. Within 7 days after the time stated in the order, the mediator mustshall file a notice with the clerk stating only the date of completion of mediation, who participated in the mediation, whether settlement was reached, and whether any further mediation is warranted.

(d) If mediation results in full or partial settlement of the case, the parties mustshall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) underpursuant to MCR 7.218(B).

(e) The mediator may charge a reasonable fee, which mustshall be divided between and borne equally by the parties unless otherwise agreed and paid by the parties directly to the mediator. If a party does not agree upon the fee requested by the mediator, upon motion of the party, the chief judge or another designated judge mustshall set a reasonable fee. In all other respects, mediator fees areshall be governed by MCR 2.411(D).

(f)-(g) [Unchanged.]

(3) Selection of Mediator.

(a) Except as otherwise provided in this rule, the selection of a mediator isshall be governed by MCR 2.411(B).

(b) Within the time provided in the order referring a case to mediation, the parties may stipulate to the selection of a mediator. Such stipulation mustshall be filed with the clerk of the court. If the parties do not file a stipulation agreeing to a mediator within the time provided, the court willshall appoint a mediator from the roster of approved mediators maintained by the circuit court in which the case originated.

(B) Notice of Calendar Cases. After the briefs of both parties have been filed, or after the expiration of the time for filing the appellee's brief, the clerk mustshall notify the parties that the case will be submitted as a "calendar case" at the next available session of the court.

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence mustshall be given to:

(1)-(2) [Unchanged.]

(3) Interlocutory appeals from the grant of a preliminary injunction;

(4) [Unchanged.]

(5) appeals of decisions holding that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid; ~~and~~

(6) actions brought under Const 1963, art 9, §§ 29-34 (Headlee actions); and

(7) [Unchanged.]

(D) Arrangement of Calendar. Twenty-one days before the first day of the session, the clerk must send~~shall mail~~ to all parties in each calendar case notice of the designated panel, location, day, and order in which the cases will be called.

(E) [Unchanged.]

RULE 7.215 OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. An opinion of the court that bears the writer's name must~~shall~~ be published by the Supreme Court reporter of decisions. A memorandum opinion must~~shall~~ not be published. A per curiam opinion must~~shall~~ not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court. An opinion not designated for publication is~~shall be~~ deemed "unpublished."

(B) Standards for Publication. A court opinion must be published if it:

(1)-(5) [Unchanged.]

(6) criticizes existing law; ~~or~~

(7) [Unchanged.]

(8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan s~~S~~tatute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid.

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party must~~shall~~ explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave

to appeal into the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

(D) Requesting Publication.

(1) Any party may request publication of an authored or per curiam opinion not designated for publication by

(a) filing with the clerk 4 copies of a letter stating why the opinion should be published, and

(b) servingmailing a copy onto each party to the appeal not joining in the request.

Such a request must be filed within 21 days after release of the unpublished opinion or, if a timely motion for rehearing is filed, within 21 days after the denial of the motion.

(2) [Unchanged.]

(3) Promptly after the expiration of the time provided in subrule (D)(2), the clerk mustshall submit the request, and any response that has been received, to the panel that filed the opinion. Within 21 days after submission of the request, the panel willshall decide whether to direct that the opinion be published. The opinion willshallbe published only if the panel unanimously so directs. Failure of the panel to act within 21 days willshall be treated as a denial of the request.

(4) The Court of Appeals mustshall not direct publication if the Supreme Court has denied an application for leave to appeal under MCR 7.305.

(E) Judgment.

(1) [Unchanged.]

(2) The clerk mustshall send a certified copy of the opinion or order, with the date of filing stamped on it, to each party and, in an appeal, to the court or tribunal from which the appeal was received. In criminal cases, the clerk shall provide an additional copy of any opinion or order disposing of an appeal or of any order denying leave to appeal to the defendant's lawyer, which the lawyer must promptly send to the defendant a copy of any opinion or order disposing of an appeal or of any order denying leave to appeal. An opinion or order is notice of the entry of judgment of the Court of Appeals.

(F) Execution and Enforcement.

(1) Routine Issuance. Unless otherwise ordered by the Court of Appeals or the Supreme Court or as otherwise provided by these rules,

(a) the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal into the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court;

(b) execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210(~~I~~H~~]~~) or by the Supreme Court clerk under MCR 7.310) with a certified copy of the court's judgment or, if a printed record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

(2) [Unchanged.]

(G) Entry, Issuance, Execution Oon, and Enforcement of All Other Orders. An order other than one described in subrule (E) is entered on the date of filing. The clerk must promptly send a certified copy to each party and to the trial court or tribunal. Unless otherwise stated, an order is effective on the date it is entered.

(H) [Unchanged.]

(I) Reconsideration.

(1) A motion for reconsideration may be filed within 21 days after the date of the order or the date stamped on an opinion. The motion mustshall include all facts, arguments, and citations to authorities in a single document and mustshall not exceed 3,200 words or, for self-represented litigants without access to a word-processing system, 10 double-spaced pages. A copy of the order or opinion of which reconsideration is sought must be included with the motion. Motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3).

(2) A party may answer a motion for reconsideration within 14 days after the motion is served on the party. An answer to a motion for reconsideration mustshall be a single document and shall not exceed 2,500 words or, for self-represented litigants without access to a word-processing system, seven7 double-spaced pages.

(3)-(4) [Unchanged.]

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1)-(2) [Unchanged.]

(3) Convening of Special Panel.

(a) Poll of Judges. Except as provided in subrule (3)(b), within 28 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether the particular question is both outcome--determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). Special panels may be convened to consider outcome-determinative questions only.

(b) Effect of Pending Supreme Court Appeal. ANo poll must notshall be conducted and a special panel mustshall not be convened if, at the time the judges are required to be polled, the Supreme Court has granted leave to appeal in the controlling case.

(c) [Unchanged.]

(4) Composition of Panel. A special panel convened underpursuant to this rule consists of seven7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

(5) Consideration of Case by Panel. An order directing the convening of a special panel must vacate only that portion of the prior opinion in the case at bar addressing the particular question that would have been decided differently but for the provisions of subrule (1). The special panel mustshall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its

decision to the case at bar. The parties are permitted to file supplemental briefs~~,~~ and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument. The special panel must~~shall~~ return to the original panel for further consideration any remaining~~,~~ unresolved issues, as the case may require.

(6) [Unchanged.]

(7) Reconsideration; Appeal. There is no appeal from the decision of the Court of Appeals as to whether to convene a special panel. As to the decision in the case at bar, the time limits for moving for reconsideration~~rehearing~~ or for filing an application for leave to appeal in~~to~~ the Supreme Court run from the date of the order declining to convene a special panel or, if a special panel is convened, from the date of the decision of the special panel, except that, if the case is returned to the original panel for further consideration in accordance with subrule (5), the time limits ~~shall~~ run from the date of the original panel's decision~~,~~ after return from the special panel. If a motion for reconsideration is filed, it will~~shall~~ be submitted to the special panel, which, if appropriate, may refer some or all ~~of~~ the issues presented to the original panel.

RULE 7.216 MISCELLANEOUS RELIEF

(A) Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:

(1) exercise any or all ~~of~~ the powers of amendment of the trial court or tribunal;

(2) [Unchanged.]

(3) permit amendment of or additions to the grounds for appeal;

(4)-(10) [Unchanged.]

(B) [Unchanged.]

(C) Vexatious Proceedings; Vexatious Litigator.

(1)-(2) [Unchanged.]

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the c~~C~~ourt may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the c~~C~~ourt without first obtaining leave, prohibiting the filing of actions in the c~~C~~ourt without the filing fee or security for costs required by MCR 7.209 or MCR 7.219, or other restriction the c~~C~~ourt deems just.

RULE 7.217 INVOLUNTARY DISMISSAL OF CASES

(A)-(C) [Unchanged.]

(D) Reinstatement.

(1) Within 21 days after the date of the clerk's notice of dismissal under~~pursuant to~~ this rule, the appellant or plaintiff may seek relief from dismissal by filing a motion for reinstatement that show~~ing~~ mistake, inadvertence, or excusable neglect.

(2) [Unchanged.]

RULE 7.219 TAXATION OF COSTS; FEES

(A)-(B) [Unchanged.]

(C) Objections. Any other party may file objections to the bill of costs with the clerk within seven~~7~~ days after a copy of the bill is served. The objecting party must serve a copy of the objections on the prevailing party and file proof of that service.

(D) [Unchanged.]

(E) Review. The action by the clerk will be reviewed by the Court of Appeals on motion of either party filed within seven~~7~~ days from the date of taxation, but on review only those affidavits or objections that~~which~~ were previously filed with the clerk may be considered by the court.

(F) Costs Taxable. A prevailing party may tax only the reasonable costs incurred in the Court of Appeals, including:

(1) ~~printing of briefs, or if briefs were typewritten,~~ a charge of $1 per original page for the prevailing party's costs associated with preparation of appellant's brief, appellee's brief, a supplemental brief or a reply brief, not including any attachments or appendices;

(2)-(7) [Unchanged.]

(G) Fees Paid to Clerk. The clerk may~~shall~~ collect the following fees, which may be taxed as costs:

(1)-(5) [Unchanged.]

(H) [Unchanged.]

(I) Violation of Rules. The Court of Appeals may impose costs on a party or an attorney ~~when in its discretion they should be assessed~~ for violation of these rules.

Staff Comment (ADM File No. 2022-32): The proposed amendments of subchapter 7.200 would make technical amendments of the COA rules in an effort to modernize them and ensure they reflect the COA's established practices.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by February 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-32. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered November 9, 2022:

PROPOSED AMENDMENTS OF MCR 3.913, 3.943, 3.977, AND 3.993 AND PROPOSED ADOPTION OF 3.937.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.913, 3.943, 3.977, and 3.993 and a proposed addition of Rule 3.937 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

> [Rule 3.937 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.913 REFEREES

(A)-(B) [Unchanged.]

(C) Advice of Rights ~~to Review of Referee's Recommendations~~.

(1) During a hearing held by a referee, the referee must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B).

(2) At the conclusion of a hearing described in MCR 3.937(A), the referee must provide the juvenile with advice of appellate rights in accordance with MCR 3.937. When providing this advice, the referee must state that the appellate rights do not attach until the judge enters an order described in MCR 3.993(A).

RULE 3.937 ADVICE OF APPELLATE RIGHTS

(A) At the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody, the court must advise the juvenile on the record that:

(1) The juvenile has a right to appellate review of the order.

(2) If the juvenile cannot afford an attorney for appeal, the court will appoint an attorney at public expense and provide the attorney with the complete transcripts and record of all proceedings.

(3) A request for the appointment of an appellate attorney must be made within 21 days after notice of the order is given or an order is entered denying a timely-filed postjudgment motion.

(B) An advisement of rights must be made in plain, age-appropriate language designed to ensure the juvenile's understanding of their

rights. After advising a juvenile of their rights, the court must inquire whether the juvenile understands each of their rights.

(C) The court must provide the juvenile with a request for appointment of appellate counsel form containing an instruction that the form must be completed and filed as required by MCR 3.993(D) if the juvenile wants the court to appoint an appellate attorney.

RULE 3.943 DISPOSITIONAL HEARING

(A)-(E) [Unchanged.]

(F) Advice of Appellate Rights. At the conclusion of the dispositional hearing, the court must provide the juvenile with advice of appellate rights in accordance with MCR 3.937.

RULE 3.977 TERMINATION OF PARENTAL RIGHTS

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a)-(b) [Unchanged.]

(c) A request for the assistance of an attorney must be made within 21~~14~~ days after notice of the order is given or an order is entered denying timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d)-(e) [Unchanged.]

(2) [Unchanged.]

(K) [Unchanged.]

RULE 3.993 APPEALS

(A)-(C) [Unchanged.]

(D) Request and Appointment of Counsel.

(1) A request for appointment of appellate counsel must be made within 21~~14~~ days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.

(2)-(3) [Unchanged.]

(E) [Unchanged.]

Staff Comment (ADM File No. 2022-34): The proposed amendments of MCR 3.913 and 3.943 and proposed addition of MCR 3.937 would provide greater due process protections for juveniles in the justice system by ensuring that they are fully advised of their appellate rights at appropriate times and in a manner that is designed to ensure understanding of those rights. The proposed amendments of MCR 3.977 and 3.993 would extend the timeframe for requesting appointment of appellate counsel to 21 days, which mirrors the timeframe for filing a claim of appeal in cases subject to those rules.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by March 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2022-34. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered December 14, 2022:

PROPOSED ADOPTION OF ADMINISTRATIVE ORDER, NO. 2022-X.

On order of the Court, this is to advise that the Court is considering an administrative order that would create a vendor-neutral citation system for Michigan appellate decisions. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notice and agendas for public hearings are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

ADMINISTRATIVE ORDER NO. 2022-X — CREATION OF A VENDOR-NEUTRAL CITATION SYSTEM.

Traditional appellate opinion citations are prescribed by commercial vendors and assume that every person has access to the vendors' print publications. Vendor-neutral citations, also known as public-domain citations, are different in that they do not depend on a proprietary publication. Vendor-neutral citations are also available immediately upon release of a court opinion or order, eliminating the waiting period for a permanent citation. In early 2022, the Michigan Supreme Court (MSC) and Michigan Court of Appeals (COA) formed an internal workgroup to consider whether Michigan should adopt vendor-neutral citations, and if so, what those citations would look like. That workgroup supported the idea of using citations that are tied to the Courts' integrated docketing systems. Adoption of vendor-neutral citations has no bearing on the continued publication of the Michigan Reports and Michigan Appeals Reports.

Under this system, each citation includes the year of decision, the Court abbreviation ("MI" for the Michigan Supreme Court and "MI App" for the Court of Appeals), and a unique identifier consisting of the docket number and the event number at which the opinion or order was docketed. The event number can be found on the Courts' website. To find the event number, go to the case search page, search for the case by name or docket number, click on the case name to view the case information page, and scroll down to the list of docketed events; the event numbers are listed to the right of the event dates. For Court of Appeals opinions, the event number to be used for the citation is the event number used to docket the lead opinion, even if the reference is to a minority opinion. As is standard in Michigan appellate decisions, when citing a minority opinion a parenthetical should be included that indicates the author and the type of minority opinion (e.g., concurring in part; dissenting). An unpublished Court of Appeals opinion or order must also have "-U" appended to the Court abbreviation. Pinpoint citations are based on the page numbers of the opinion or order as released or revised by the Court. The following list provides a description of each citation type and an example:

MSC Opinion
Citation description:
[*Case Caption*], [Year] MI [Docket No.]-[Event No.].

Example:
Meyers v Rieck, 2022 MI 162094-77.

MSC Opinion with Pinpoint Reference
Citation description:
[*Case Caption*], [Year] MI [Docket No.]-[Event No.], p [Page No.].

Example:
Meyers v Rieck, 2022 MI 162094-77, p 11.

MSC Order
Citation description:
[*Case Caption*], [Year] MI [Docket No.]-[Event No.].

Example:
People v Christian, 2021 MI 162354-72.

COA Published Opinion
Citation description:
[*Case Caption*], [Year] MI App [Docket No.]-[Event No.].

Example:
Campbell v Mich Dep't of Treasury, 2020 MI App 350248-19.

COA Dissenting/Concurring Opinion
Citation description:
[*Case Caption*], [Year] MI App [Docket No.]-[Event No.] ([JUDGE's LAST NAME], [Judicial Position Indicator], [Opinion Type]).

Example:
In re Baby Boy Doe, 2021 MI App 353796-35 (RONAYNE KRAUSE, P.J., dissenting).

COA Unpublished Opinion
Citation description:
[*Case Caption*], [Year] MI App-U [Docket No.]-[Event No.].

Example:
People v Edwards, 2020 MI App-U 348807-64.

COA Published Order
Citation description:
[*Case Caption*], [Year] MI App [Docket No.]-[Event No.].

Example:
In re AST, 2022 MI App 362349-7.

COA Unpublished Order
Citation description:
[*Case Caption*], [Year] MI App-U [Docket No.]-[Event No.].

Example:
People v Peeler, 2021 MI App-U 357754-22.

Therefore, on order of the Court, this vendor-neutral citation system is adopted for Court of Appeals and Michigan Supreme Court opinions and orders beginning [Date]. After that date, the Michigan Supreme Court and the Michigan Court of Appeals must assign a vendor-neutral citation to their opinions and orders using this system.

Staff Comment (ADM File No. 2022-37): This administrative order would create a vendor-neutral citation system for Michigan appellate decisions. This new system would allow for permanent citations to be available immediately upon release of a court opinion or order, eliminating the waiting period for a permanent citation.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by April 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2022-37. Your comments and the comments of others will be posted under the chapter affected by this proposal.

Order Entered December 21, 2022:

PROPOSED AMENDMENTS OF MCR 7.202 AND 7.209.

On order of the Court, this is to advise that the Court is considering amendments of Rule 7.202 and 7.209 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for each public hearing are posted on the Public Administrative Hearings page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/public-administrative-hearings].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.202 DEFINITIONS

For purposes of this subchapter:

(1)-(5) [Unchanged.]

(6) "final judgment" or "final order" means:

(a) In a civil case,

(i)-(iv) [Unchanged.]

~~(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.~~

(b) [Unchanged.]

RULE 7.209 BOND; STAY OF PROCEEDINGS

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1)-(6) [Unchanged.]

~~(7) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the proceedings shall be stayed during the pendency of the appeal, unless the Court of Appeals directs otherwise.~~

Staff Comment (ADM File No. 2021-35): The proposed amendments of MCR 7.202 and MCR 7.209 offer an alternative to the proposal published for comment on June 22, 2022. The proposed amendments would eliminate certain orders denying governmental immunity to a governmental party from the definition of a "final judgment" or "final order" for purposes of subchapter 7.200 of the Michigan Court Rules, thereby eliminating the need for a stay of proceedings in those cases under MCR 7.209(E)(7).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by April 1, 2023 by clicking on the "Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page [https://www.courts.michigan.gov/rules-administrative-orders-and-jury-instructions/proposed-adopted/michigan-court-rules]. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2021-35. Your comments and the comments of others will be posted under the chapter affected by this proposal.

CAVANAGH, J. (*concurring*). I agree with the Court's order publishing for comment proposed amendments to remove MCR 7.202(6)(a)(v) and MCR 7.209(E)(7) from the court rules. I write to provide some context for these provisions and to identify specific issues to facilitate public comment.

In 2002, this Court amended the court rules to provide for an interlocutory appeal of right and an automatic stay of trial court proceedings if a party appeals a trial court's denial of governmental immunity. ADM File No. 2001-07, 466 Mich xc (2002). In most other contexts, a party must file an application for leave to appeal an order that does not entirely dispose of that party's claims,[1] with the Court of Appeals having discretion to either resolve the issue raised at that time or decline to do so until proceedings in the trial court are complete.[2] Similarly, a party seeking interlocutory appellate review in the Court of

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[1] See generally MCR 7.203 (distinguishing an "appeal of right," which may be brought after entry of "a final judgment or final order," from an "appeal by leave," which may be brought after entry of "a judgment or order . . . that is not a final judgment appealable by right"); MCR 7.202(6) (defining " 'final judgment' or 'final order' ").

[2] See MCR 7.205(E) (providing the Court of Appeals the authority to "grant or deny the application [for leave to appeal], enter a final decision, grant other relief, or request additional material from the record"). In practice, when the Court of Appeals denies an application or leave to appeal, it does so either "for lack of merit in the grounds presented" or "for failure to persuade the Court of the need for immediate appellate review." A denial "for lack of merit" resolves the issue raised in the application, and the appellant is generally precluded from raising that same issue in any subsequent appeal. See, e.g., *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 144 (2019). By contrast, a denial for "failure to persuade" is a nonsubstantive disposition that " 'does not foreclose the parties from pursuit of the same or related

Appeals is generally not entitled to an automatic stay of trial court proceedings, but rather is required to file a motion in the trial court or the Court of Appeals requesting a stay.[3] The justification for treating denials of governmental immunity differently was that "the government *is* different" because "[u]nlike other litigants, the government cannot be sued, unless, by legislation, it has affirmatively allowed a particular type of suit to proceed. This immunity . . . is of considerably diminished value when the government, i.e., the taxpayer, must incur the costs of extended litigation before being able to invoke the principle of immunity." ADM File No. 2001-07, 466 Mich at xciv (TAYLOR, J., concurring).

With the benefit of 20 years of experience, I believe it is appropriate to reevaluate with the input of the bench and the bar whether the unique interests identified by Justice TAYLOR justify retaining these amendments. Stated broadly, the issue the Court needs to consider is whether, in practical application, these rules have struck the proper balance between protecting taxpayers from the expense of unnecessary litigation and ensuring prompt and efficient resolution of claims against governmental entities that are not barred by governmental immunity. Public comment on the following specific issues would assist the Court in making this determination:

• Michigan's court rules currently allow litigants to file an interlocutory application for leave to appeal a nonfinal order. See MCR 7.203(B). In such an application, the appellant must "set[] forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal[.]" MCR 7.205(B)(1)(d). In the absence of MCR 7.202(6)(a)(v) and MCR 7.209(E)(7), would the ability to file an application for leave to appeal (and a motion to stay trial court proceedings pending appeal) adequately protect a governmental entity's interest in the swift dismissal of claims barred by governmental immunity? In other words, could the government's unique interest in preserving taxpayer dollars be adequately considered by the Court of Appeals on a case-by-case basis through the "substantial harm" requirement of MCR 7.205(B)(1)(d)?

• Over the years, Michigan appellate courts have considered the proper scope and application of MCR 7.202(6)(a)(v).[4] Has this rule been

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issues on later appeals of right.' " *Rott v Rott*, 508 Mich 274, 289 (2021), quoting *People v Willis*, 182 Mich App 706, 708 (1990).

[3] See MCR 7.209(A); MCR 7.209(D).

[4] See, e.g., *Watts v Nevils*, 477 Mich 856, 856 (2006) (resolving a conflict between published Court of Appeals decisions and holding that a denial of summary disposition under MCR 2.116(C)(10) instead of (C)(7) triggered an appeal as of right where "the circuit court order denied governmental immunity to these defendants"); *Star Tickets v Chumash Casino Resort*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2015 (Docket No. 322371), p 5 n 7 (noting that whether a denial of tribal immunity triggers a right to an interlocutory appeal under this rule is an "intriguing question" but

easy to interpret and apply in practice? Or have courts and litigants been required to expend significant resources litigating whether a particular order falls within the scope of this rule?

• How have these rules affected the resources expended by litigants in claims brought against governmental entities? Have these rules actually resulted in expedited resolution of claims barred by governmental immunity and a decreased cost to taxpayers? Conversely, what effect have these rules had on private litigants filing claims against the state when governmental immunity did not bar the claim (either as a matter of law or because there were questions of fact that precluded summary disposition)?

• How frequently have trial court decisions denying claims of governmental immunity been reversed on appeal? Have governmental entities used these rules for gamesmanship? For example, as has been suggested, have governmental entities been filing unmeritorious claims of appeal simply to delay proceedings and increase the litigation costs to plaintiffs, or in the hope that after the appeal is resolved the case will be presided over by a different Court of Claims judge that the governmental entity views as more favorable to its position?

• In practice and in theory, how do these rules apply in the context of an unmeritorious motion to dismiss on governmental immunity grounds? Does the denial of such a claim automatically trigger these

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declining to resolve it and instead treating defendant's claim of appeal as an application for leave and granting it); *Hart v Michigan*, 506 Mich 857, 858 (2020) (CLEMENT, J., concurring) (questioning whether the Court of Appeals has the authority to treat an improper claim of appeal as if it were an application for leave to appeal and whether a state defendant that invoked *sovereign* immunity is entitled to an appeal as of right under the rule); *Roberts v Kalkaska Co Rd Comm*, unpublished order of the Court of Appeals, entered September 23, 2020 (Docket No. 354228) (holding that " 'governmental immunity' is a term of art referring to the general immunity of governmental actors from tort liability" and that "a claim of immunity from non-tort property law claims under MCL 600.5821(2) does not constitute a claim of governmental immunity within the meaning of MCR 7.202(6)(a)(v)"); *Tyrrell v Univ of Mich*, 335 Mich App 254, 264-265 (2020) (holding that the defendants were not entitled to an appeal as of right where the claim of governmental immunity was based on the plaintiff's failure to comply with MCL 600.6431 when filing a claim in circuit court under Michigan's Persons with Disabilities Civil Rights Act); *Krieger v Dep't of Environment, Great Lakes, and Energy*, unpublished order of the Court of Appeals, entered November 8, 2021 (Docket No. 358076 and others) (dismissing a claim of appeal where "the gravamen of defendants' motion for summary disposition . . . was not a claim of immunity . . . but rather an assertion that plaintiffs did not adequately plead" their claims under MCR 2.116(C)(8)).

provisions?[5] If so, is the rule susceptible to possible abuse, given that a clearly unmeritorious claim for governmental immunity that is barred by binding precedent could be used to delay proceedings? If not, would it be problematic to require the Court of Appeals to assess in some respect the merits of an assertion of governmental immunity to determine whether it is required to hear the appeal as of right under MCR 7.202(6)(a)(v)?

• How have these rules affected the administration of claims against governmental entities in the Court of Claims? For example, given that the right to appeal and an automatic stay applies only to denials of governmental immunity, have trial courts regularly been required to parse claims and divide them up by issue or party such that claims in which governmental immunity is asserted are not litigated pending appeal while other claims are permitted to proceed? If so, does this unduly hamper trial courts in efficiently and effectively adjudicating the cases pending before them?

• Similarly, how have these rules affected the Court of Appeals' administration of appeals arising from claims against governmental entities? For example, is it common for litigants in such cases to file multiple appeals stemming from one lawsuit, either because not all the claims raised are subject to governmental immunity or because there is uncertainty as to whether a particular order falls within the scope of MCR 7.202(6)(a)(v)?[6] If so, to what extent does this create administrative difficulties for the Court of Appeals?

• How does the Court of Appeals administratively consider whether a claim of appeal falls within the scope of MCR 7.202(6)(a)(v)? If the Court of Appeals determines that a claim of appeal is not properly filed under this rule, how does it treat that appeal? As previously noted by Chief Justice CLEMENT, the Court of Appeals has at times dismissed an appeal as of right for lack of jurisdiction if it determines that the order is outside the scope of MCR 7.202(6)(a)(v). See *Hart*, 506 Mich at 861 (CLEMENT, J., concurring), citing *Pierce v City of Lansing*, 265 Mich App 174, 182 (2005). However, more recently it appears that the general practice has been to "assert[] discretion to treat an improper claim of appeal as an application, and then grant[] this constructive application in order to reach the legal questions presented in the name of judicial economy." *Hart*, 506 Mich at 863 (CLEMENT, J., concurring). Is this

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[5] See *Tyrrell*, 335 Mich App at 264-265 (holding that there was no appeal of right because the defendants' argument for dismissal was not premised on a statute conferring governmental immunity); *Christie v Wayne State Univ*, 508 Mich 1003 (2021) (directing oral argument on the issues addressed in *Tyrrell*).

[6] See, e.g., *Roberts v Kalkaska Co Rd Comm*, 508 Mich 894 (2021) (addressing defendant's appeal as of right that was dismissed by the Court of Appeals for lack of jurisdiction); *Roberts v Kalkaska Co Rd Comm*, 508 Mich 893 (2021) (addressing defendant's application for leave to appeal the same trial court order.)

practice a reflection of the administrative difficulties in distinguishing between final orders under MCR 7.202(6)(a)(v) and nonfinal orders and in enforcing that distinction?

• If there are inefficiencies with the current process, are there amendments this Court could adopt, short of a complete elimination of these provisions, that would mitigate these problems while continuing to advance the interests underlying these provisions? Do other jurisdictions provide preferential rights of appellate review for denials of governmental immunity? If so, are there any lessons we can take from their experiences to improve our own court rules?

I look forward to the public comment addressing these and other issues.